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NOTES AND COMMENTS

A GOOD RESULT DOES NOT JUSTIFY IMPROPER MEANS: A STRICT SCRUTINY OF *METRO BROADCASTING, INC. v. FEDERAL COMMUNICATIONS COMMISSION*

I. INTRODUCTION

In a perfect world, the consideration of one's race or gender would never be the determinant factor in allocating important benefits.¹ Rather, talent and individual merit would determine one's fate.² Unfortunately, we do not live in a perfect world, because the lasting effects of discrimination continue to play a dominant role in America.³ Although the Fourteenth Amendment declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws,"⁴ classifications based on race must be adopted in order to combat the effects of racial discrimination. While racial classifications raise suspicions because historically they were used to deny equality, serious progress requires the use of race-based programs that benefit minorities.⁵ In recent

1. Brief Amicus Curiae of the American Civil Liberties Union, The New York City Commission on Human Rights, and The NOW Legal Defense and Education Fund in Support of Petitioner in No. 89-700 and in Support of Respondents in No. 89-453 at 6, *Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.*, 110 S. Ct. 2997 (1990) (No. 89-700); *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990) (No. 89-453). See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). But see *Morton v. Mancari*, 417 U.S. 535 (1974).

2. Brief Amicus Curiae of the American Civil Liberties Union, The New York City Commission on Human Rights, and The NOW Legal Defense and Education Fund in Support of Petitioner in No. 89-700 and in Support of Respondents in No. 89-453 at 6-7, *Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.*, 110 S. Ct. 2997 (1990) (No. 89-700); *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990) (No. 89-453).

3. Margaret E. Deane, Note, *City of Richmond v. J.A. Croson Co.*: *A Federal Legislative Answer*, 100 YALE L.J. 451, 455 (1990); Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U.L. REV. 1307, 1309 (1991). See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role.").

4. U.S. CONST. amend. XIV.

5. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 239 (1978). See also T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062 (1991) ("[I]n order to make progress in ending racial oppression and racism, our political and moral discourse must move from colorblindness to colorconsciousness, from antidiscrimination to racial justice.").

years, however, the Supreme Court has disregarded the inequalities minorities face and invalidated many of these affirmative action programs.⁶

In *Metro Broadcasting, Inc. v. Federal Communications Commission* ("Metro Broadcasting"),⁷ the Court finally appeared to breathe new life into affirmative action,⁸ when it upheld two programs that gave minorities preference in obtaining radio and television licenses.⁹ Upon closer scrutiny, however, *Metro Broadcasting* does not demonstrate the Supreme Court's commitment to affirmative action. Instead, it merely contributes to the constitutional quagmire¹⁰ existing in the affirmative action area.¹¹ By ignoring precedent¹² and by failing to establish a test for "benign" discrimination,¹³ the Court ensures a perilous future for affirmative action programs.

In *Metro Broadcasting*, the Court held that "benign race-conscious

6. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

7. 110 S. Ct. 2997 (1990).

8. Affirmative action is defined as "employment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group members; i.e. designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination" BLACK'S LAW DICTIONARY 55 (5th ed. 1979). See *National Labor Relations Bd. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939); *National Labor Relations Bd. v. Leviton Mfg. Co.*, 111 F.2d 619, 621 (2d Cir. 1940). Comprehensively defined, "affirmative action" includes a variety of activities aimed at "overcom[ing] the effects of past or present practices, policies, or other barriers to equal employment." EEOC Guidelines, Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964 As Amended, 29 C.F.R. § 1608.1(c) (1990).

9. 110 S. Ct. at 3008-09.

10. "*Metro [Broadcasting]* leaves the constitutional future of affirmative action as murky as ever" Michel Rosenfeld, *Metro Broadcasting, Inc. v. FCC: Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583, 583 (1991).

11. Prior to *Metro Broadcasting*, the Supreme Court contended with government-sponsored racially based programs four different times. In these four cases—*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986), *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the twenty-three opinions generated by the Justices evidences the confusion of the constitutional issues. See *infra* text accompanying notes 145-195. See also Jesse H. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 IOWA L. REV. 255, 255 (concluding "that an enormous degree of ambiguity and uncertainty persists [in the affirmative action area]").

12. "The Supreme Court's decision in *Metro [Broadcasting]* seems difficult to reconcile with previous decisions upholding affirmative action." Michel Rosenfeld, *Metro Broadcasting, Inc. v. FCC: Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583, 587 (1991).

13. Benign discrimination has been described as "the use of racial classifications to benefit rather than burden particular racial or ethnic minorities." JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 661 (2d ed. 1983).

measures mandated by Congress" can be subjected to the standard of intermediate scrutiny, which requires a program to be substantially related to an important governmental interest.¹⁴ Although the application of this standard provided the correct result in *Metro Broadcasting*, this standard is clearly incongruous with prior decisions. It explicitly contradicts the Supreme Court opinion in *City of Richmond v. J.A. Croson Co.* ("Croson"),¹⁵ which held that all racial classifications should be subjected to strict scrutiny.¹⁶ Strict scrutiny is more stringent than intermediate scrutiny and requires: (1) a *compelling*, rather than an *important*, governmental interest; and (2) the ends to be *necessary* and *narrowly tailored*, rather than *substantially related*, to the achievement of that interest.¹⁷

14. *Metro Broadcasting*, 110 S. Ct. at 3008-09. "[B]enign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Id.*

15. 488 U.S. 469 (1989).

16. The Court concluded that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *Id.* at 494 (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.).

[T]here is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id. at 493.

17. Courts have used three standards of review in deciding equal protection challenges to governmental actions. Each standard consists of a two-prong test with an ends and means requirement. The first prong evaluates the ends, purposes, objectives and interests the program purports to serve. Roy L. Brooks, *The Affirmative Action Issue: Law, Policy and Morality*, 22 CONN. L. REV. 323, 338 (1990). The second prong scrutinizes whether the program best achieves the ends. *Id.* The three standards of review are strict scrutiny, intermediate scrutiny, and rational basis.

Classifications based on race are subject to heightened scrutiny, either intermediate scrutiny or strict scrutiny. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 496 (1986). The strict scrutiny test requires Justices to independently determine the degree that the classification bears to the end. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 591-92 (2d ed. 1983). The government must show that it is pursuing a "compelling" or "overriding" end and that the classification is necessary to promote that compelling interest. *Id.*

The second standard of review, intermediate scrutiny, was never used by a majority of the Supreme Court in racial equal protection claims until *Metro Broadcasting*. In *Regents of the Univ. of Cal. v. Bakke*, four of the five-member majority favored an intermediate level of scrutiny. 438 U.S. 265, 359 (1978) (opinion of Brennan, J., joined by White, Marshall, and Blackmun, JJ.). These justices contended that classifications based on race should be subjected to the same standard as gender classifications. Jennifer M. Bott, Note, *From Bakke to Croson: The Affirmative Action Quagmire and the D.C. Circuit's Approach to FCC Minority Preference Policies*, 58 GEO. WASH. L. REV. 845, 849 n.27 (1990). This test requires an "important governmental objective" be articulated and that the classification be "substantially related to"

Thus, *Metro Broadcasting* does not pave the way for future affirmative action programs as some have suggested.¹⁸ It only confirms that affirmative action has an uncertain and perilous future.¹⁹

Additionally, affirmative action programs are in danger of extinction because two of the five justices who comprised the majority in *Metro Broadcasting* have since retired from the Court.²⁰ After serving on the Supreme Court for nearly thirty-four years,²¹ Justice Brennan's final majority opinion was *Metro Broadcasting*.²² David Souter, who has since replaced Justice Brennan, has yet to make his views on affirmative action

those objectives. *Bakke*, 438 U.S. at 359 (quoting *Califano v. Webster*, 430 U.S. 313, 317 (1977) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976))).

In contrast, classifications based on a non-suspect class are subject to a lower level or rational basis scrutiny. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 496 (1986). A classification will pass the rational basis test if it is rationally related to a legitimate end. Mary C. Daly, *Affirmative Action, Equal Access and the Supreme Court's 1988 Term: The Rehnquist Court Takes a Sharp Turn to the Right*, 18 HOFSTRA L. REV. 1057, 1103 (1990).

18. Professor Kathleen Sullivan of Harvard Law School stated *Metro Broadcasting* is "a green light for many federally initiated affirmative action programs." Neal A. Lewis, *Court Ruling Encourages Affirmative Action*, N.Y. TIMES, July 4, 1990, § 1, at 12.

19. *Metro Broadcasting* is likely to be severely limited in the future, as evidenced by the strong dissenting opinions of the Court's most recent appointees. The three newest members of the Supreme Court, prior to the retirement of Justices Brennan and Marshall, comprised three out of the four dissenting votes. All three were appointed by President Reagan. President Reagan appointed Justice O'Connor in 1981. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW*, at lxvi (1986). Justice Scalia, who replaced Chief Justice Burger, was confirmed in 1986. David M. O'Brien, *Rehnquist Plus Scalia Equals a Radically New Court*, L.A. TIMES, August 17, 1986, § 5, at 3. Finally, Justice Kennedy was appointed by President Reagan and confirmed in February 1988. Al Kamen, *Kennedy Confirmed, 97-0; Senate Approves Supreme Court Nomination*, WASH. POST, February 4, 1988, at A1.

Further evidence that the dissenting opinion will soon become the majority opinion is that "the five oldest justices (with an average age of 78) formed the majority, while the four youngest (with an average age of 58) formed the dissent" in *Metro Broadcasting*. James Scanlan, *Affirmative Action: The Court's Surprise?*, TEX. LAW., July 20, 1990, at S14. As seen by the retirement of Justices Brennan and Marshall, this age factor could play an important part in future decisions.

20. The majority opinion in *Metro Broadcasting* comprised Justices Brennan, Marshall, White, Stevens, and Blackmun. After the case was decided in June 1990, Justices Brennan and Marshall announced their retirement.

In discussing the likely developments in the affirmative action area, Professor Jesse H. Choper pointed out that change appeared to be a real possibility with Justice Brennan's retirement, because these cases have almost always been decided by 5-4 votes. *Constitutional Law Conference*, 59 U.S.L.W. 2272 (November 6, 1990). Additionally, Justices O'Connor and White continue to express reservations in this area. *Id.* See also Bruce Fein & William Bradford Reynolds, *Brennan's Law: How Durable a Legacy*, LEGAL TIMES, August 13, 1990 (discussing that Brennan's last majority opinion seems endangered because "the reasoning of *Metro Broadcasting* was patently flimsy, garnered but five votes, and is unlikely to be persuasive with Brennan's successor").

21. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW*, at lviii (1986).

22. Frank Michelman, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 22, 26 (1990).

clear.²³ Recently, Justice Marshall also announced his retirement²⁴ and will be replaced by Clarence Thomas, a known opponent of affirmative action quotas.²⁵ Thus, *Metro Broadcasting* is likely to be severely limited in the future²⁶ because of its weaknesses²⁷ and the retirement of two

23. Justice Souter's views on affirmative action are unknown at this time, although he once argued that the government "should not be involved in this [referring to affirmative action]." Sam Fulwood III & Ronald J. Ostrow, *Don't Quiz Souter, Thornburgh Warns Senators*, L.A. TIMES, July 26, 1990, at A20 (quoting address by David Souter, New England Aeronautical Institute and Daniel Webster College Commencement Ceremony (May 30, 1976)).

24. Justice Thurgood Marshall announced his retirement on June 27, 1991, after serving twenty-four years on the Supreme Court. Andrew Rosenthal, *Marshall Retires from High Court; Blow to Liberals*, N.Y. TIMES, June 28, 1991, at A1.

25. See David G. Savage & Sara Fritz, *Thomas' Rise Inspires Friends, Irks Liberals; Nominee: The Judge as a Toddler had Lived in a Sharecropper's Shack. Critics Say He Turned His Back on the Less Fortunate in Climb from Rags to Republicanism*, L.A. TIMES, July 2, 1991, at A1; Marlene Cimon, *A Look at Possible Supreme Court Candidates; Clarence Thomas*, L.A. TIMES, June 29, 1991, at A18; David G. Savage, *Black Judicial Candidate Stirs Debate; Courts: Clarence Thomas is a Rising Star in the GOP. But His Critics Charge His Views on Discrimination Are a Cause for Concern*, L.A. TIMES, February 5, 1990, at A16.

26. "With Justice Brennan's departure from the court, it seems unlikely that *Metro Broadcasting* and *Astroline* will remain more than a footnote in the annals of Supreme Court history, because I can't imagine any replacement for Justice Brennan supporting his views on affirmative action." *Law Professor Predicts Major Changes Stemming from Justice Brennan's Retirement*, [August 9, 1990] WASH. INSIDER (BNA) (quoting Carin Clauss, a University of Wisconsin Law School professor and the solicitor of labor under President Carter). "Since the Court predicated the legality of the set-aside on the important governmental objective of achieving broadcasting diversity, the *Metro [Broadcasting]* holding may well be limited to cases involving first amendment considerations if Justice Brennan's replacement, Justice Souter, joins the dissenters when the Court inevitably revisits the issue." Robert E. Suggs, *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257, 1258 (1991) (citations omitted).

27. Justice Brennan, known for his ability to build coalitions to achieve a desired result, should not be faulted for the opinion's weaknesses. He most likely had to write *Metro Broadcasting* this way in order to gain a majority opinion. Neal Devins, *Metro Broadcasting, Inc. v. F.C.C.: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 128 (1990). See Marcia Coyle, *A Final Victory Marks the End of a Career*, NAT'L L.J., Aug. 13, 1990, at S4 (noting that *Metro Broadcasting* reflects Justice Brennan's "consummate skill and brilliance in fine-tuning decisions in such a way that the essential fifth vote either signed on to or wrote the majority opinion"). See also Mark Tushnet, *The Optimist's Tale*, 132 U. PA. L. REV. 1257, 1263 (1984) (observing that the *Plyler v. Doe*, 457 U.S. 202 (1982), opinion's "very awkwardness reveals much about what Justice Brennan really was doing: not writing a carefully crafted opinion, not being profound, but building a coalition").

In order to garner Justice White's vote, who is known for his strong judicial deference to Congress, Justice Brennan may have had to limit the application of intermediate scrutiny to congressionally mandated preferences, rather than allowing it to be applied to all benign measures. Justice White was in the majority in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and advocated a strict scrutiny test for a state action, but in *Metro Broadcasting* he advocated intermediate scrutiny for federal actions. Neal Devins, *Metro Broadcasting v. F.C.C.: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 128 n.21 (1990). See also Neal A. Lewis, *Court Ruling Encourages Affirmative Action*, N.Y. TIMES, July 4, 1990, § 1, at 12 (Professor Charles G. Fried of Harvard Law School stated, "Congress looms very large in [Justice]

strong proponents of affirmative action.²⁸

The first section of this note sets forth a statement of the case and presents a brief history of the Federal Communications Commission ("FCC"), which enacted the affirmative action programs at issue.²⁹ The next section discusses the opinions of the Supreme Court in *Metro Broadcasting*.³⁰ The third section presents an overview of the Supreme Court's major decisions on affirmative action prior to *Metro Broadcasting* and explores the conflict between *Croson* and *Metro Broadcasting*.³¹ It also evinces an argument that an intermediate level of scrutiny should apply to all affirmative action programs.³² The note concludes with an analysis of the implications of *Metro Broadcasting*, including the paradox between gender and race-based classifications created by this decision.³³ Although *Metro Broadcasting* provides a proper result by upholding the minority preference policies at issue, the Court's incorrect reasoning heightens the confusion in the affirmative action area.

II. STATEMENT OF THE CASE

In *Metro Broadcasting*, the Supreme Court considered the constitutionality of the FCC's minority preference policies in two combined cases.³⁴ The two policies at issue in the appellate cases of *Winter Park Communications v. F.C.C.* ("*Winter Park*")³⁵ and *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.* ("*Shurberg*")³⁶ were, respectively: (1) a pro-

White's jurisprudence."); David G. Savage, *Court OKs Affirmative Action at Federal Level*, L.A. TIMES, June 28, 1990, at A1 (Professor Laurence H. Tribe of Harvard Law School said of Justice White: "He is a strong nationalist who defers to congressional power.").

28. "[G]iven the replacement of Justice William Brennan with Justice David Souter, *Metro Broadcasting's* slim majority seems vulnerable." Neal Devins, *The Rhetoric of Equality*, 44 VAND. L. REV. 15, 36 (1991).

A comparison of the voting alignment of the remaining Justices further evidences the likelihood of *Metro Broadcasting* being limited. The four dissenting Justices vote together over eighty percent of the time. *The Supreme Court, 1989 Term: Leading Cases*, 104 HARV. L. REV. 359, 360 (1990). Justice O'Connor agrees with Chief Justice Rehnquist 81.9% of the time, Justice Scalia agrees 81.3% and Justice Kennedy 82.6%. *Id.* Therefore, without Justices Brennan and Marshall, who only voted with Chief Justice Rehnquist 38.1% and 37.4% of the time, the Chief Justice should easily be able to garner a majority in almost every case.

29. See *infra* notes 34-117 and accompanying text.

30. See *infra* notes 118-147 and accompanying text.

31. See *infra* notes 148-293 and accompanying text.

32. See *infra* notes 294-322 and accompanying text.

33. See *infra* notes 323-361 and accompanying text.

34. *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3002 (1990).

35. 873 F.2d 347 (D.C. Cir. 1989), *aff'd sub nom.* *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990).

36. 876 F.2d 902 (D.C. Cir. 1989), *rev'd sub nom.* *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990).

gram awarding a preference for minority ownership in comparative proceedings; and (2) a minority "distress sale" program, allowing an existing broadcast station in limited circumstances to be transferred to a minority-controlled firm.³⁷ In a five-to-four decision, the Supreme Court held that the programs passed intermediate scrutiny and did not violate equal protection principles,³⁸ thereby affirming the decision in *Winter Park* and reversing the decision in *Shurberg*.³⁹

A. Prior Legislative History

In the Communications Act of 1934,⁴⁰ Congress delegated exclusive authority to the FCC to grant television and radio broadcast licenses if "public interest, convenience, and necessity would be served thereby."⁴¹ If no competitors apply for the license to broadcast or object to the granting of the license, the FCC may award a license if it serves the public interest.⁴² Once a license is granted, the licensee may not assign it to another entity unless application is made to the FCC.⁴³

If two entities apply for the same license, the FCC conducts a comparative hearing to determine which applicant is more deserving.⁴⁴ In such a proceeding, the FCC weighs both the quantitative and qualitative attributes of competing applicants.⁴⁵ The FCC primarily looks at six quantitative factors:⁴⁶ (1) diversification;⁴⁷ (2) integration of ownership

37. *Metro Broadcasting*, 110 S. Ct. at 3002.

38. *Id.* at 3008-09.

39. *Id.* at 3028.

40. Communications Act, ch. 652, § 307, 48 Stat. 1083 (1934) (codified as amended at 47 U.S.C. §§ 151-610 (1982)).

41. 47 U.S.C. § 307(c) (1982). See also 47 U.S.C. §§ 151, 301, 303, 309 (1982).

42. Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 997 (1989) (quoting 47 U.S.C. §§ 307(d), 309(a) (1982)).

43. See 47 U.S.C. § 310(d) (1982). Section 310(d) provides that when a licensee applies for permission to assign or transfer control, "the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment or disposal of the permit or license to a person other than the proposed transferee or assignee."

44. In *Ashbacker Radio Corp. v. F.C.C.*, the Supreme Court held that when the Commission is faced with two mutually exclusive applications for licenses—that is, two proposed stations that would be incompatible technologically, it is obligated to set the applicants for a comparative hearing. 326 U.S. 327, 333 (1945).

45. The general evaluative framework used by the Commission in the comparative process was first set out in its *Policy Statement on Comparative Broadcast Hearings*. 1 F.C.C.2d 393 (1965).

46. *Id.* at 394-99.

47. "The Commission deemed it to be relevant whether an applicant's owners have ownership interests in other broadcast stations and other media of mass communication." *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 604 (D.C. Cir. 1984). To increase diversification of control, the FCC gives credit to entities controlled by those with few or no interests in other mass media entities. *Policy Statement on Comparative Broadcast Hearings*, 1

and management;⁴⁸ (3) proposed programming;⁴⁹ (4) past broadcast record;⁵⁰ (5) efficient use of frequency;⁵¹ and (6) the character of the applicant.⁵² If the applicants exhibit no quantitative differences, the FCC assesses a number of qualitative factors, including the race or gender of the owner, local residence, and past broadcast experience.⁵³

Initially, the FCC did not consider race a factor in comparative proceedings for new licenses.⁵⁴ Instead, it was FCC policy that minority ownership warranted no preference, unless the record indicated that the owner's race was likely to affect the station's broadcast service.⁵⁵ The FCC, however, repeatedly indicated that it was committed to providing diverse programming because it "is a key objective not only of the Communications Act of 1934 but also of the First Amendment."⁵⁶ To facilitate diverse viewpoints, the FCC adopted regulations prohibiting discrimination against minorities in the broadcast industry, including

F.C.C.2d 393, 394-95 (1965). This is the most important criterion because it reflects the FCC's preference for awarding licenses to those who do not own interests in another media. Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 998 (1989) (citing Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394-95 (1965)).

48. "The greater the degree of integration of ownership and management, the easier it is to focus on those responsible for station operations." *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 604 (D.C. Cir. 1984). Under this criterion, the FCC prefers applicants whose owners promise to work full-time managing the station. Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 998-99 (1989). "This criterion is thought to have two important justifications. First, an owner who is working full-time in the station must necessarily live locally Second, an owner will have an increased incentive to ensure that the station complies with all the rules and regulations of the FCC." *Id.* at 999 n.49.

49. Only exceptional programming proposals are considered relevant. "[M]inor differences among applicants are apt to prove to be of no significance Decisional significance will be accorded only to material and substantial differences between applicants' proposed program plans." Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 397 (1965).

50. Only unusually compliant or troublesome behavior of a broadcast owner is considered relevant. *Id.* at 398.

51. Proposals receive merit if, for engineering reasons, they would be more efficient than competing applicants. *Id.*

52. Character evidence is irrelevant unless a significant character deficiency exists. *Id.* at 399.

53. Brief for Federal Communication Commission at 3, *Metro Broadcasting v. F.C.C.*, 110 S. Ct. 2997 (1990) (No. 89-453). See *T.V. 9, Inc. v. F.C.C.*, 495 F.2d 929, 941 & n.2 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *In re WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (1978); Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965).

54. *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3004 (1990).

55. *Id.* See *In re Mid-Florida Television Corp.*, 33 F.C.C.2d 1, 17-18 (1972), *rev'd sub nom.* *T.V. 9, Inc. v. F.C.C.*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974).

56. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 981 (1978). See also Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965).

regulations requiring licensees to guarantee equal opportunity in all aspects of station employment.⁵⁷

Following a series of decisions by the District of Columbia Court of Appeals,⁵⁸ the FCC reviewed the adequacy of its diversity goals and concluded that

the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience.⁵⁹

Based on these findings, the FCC outlined three programs implementing a minority ownership policy.⁶⁰

First, the FCC outlined a policy to consider minority ownership as a factor in determining licensing decisions.⁶¹ The FCC declared that minority ownership would be considered a "plus" to be weighed with all other relevant factors in a comparative hearing.⁶² Second, the FCC established a "distress sale" policy,⁶³ which allows a broadcaster whose

57. Brief Amicus Curiae of The National League of Cities, National Conference of State Legislatures, National Association of Counties, Council of State Governments, U.S. Conference of Mayors, and International City Management Association in Support of Respondents at 4, *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990) (No. 89-453). See, e.g., *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969). See also *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 F.C.C.2d 354 (1975); *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970).

58. See, e.g., *Garrett v. F.C.C.*, 513 F.2d 1056 (D.C. Cir. 1975); *T.V. 9, Inc. v. F.C.C.*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Citizens Communications Center v. F.C.C.*, 447 F.2d 1201 (D.C. Cir. 1971).

In a 1973 decision, *T.V. 9, Inc.*, the court held that the Communications Act required the FCC to give favorable consideration to a station when racial minorities would be involved in ownership and management. 495 F.2d at 938. Two years later in *Garrett*, the District of Columbia Court of Appeals reaffirmed their position by stating that "black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry." 513 F.2d at 1056. Carl Hilliard, *Constitutional Conflict over Race and Gender Preferences in Commercial Radio and Television Licensing*, 38 U. KAN. L. REV. 343, 345 (1990) (quoting *Garrett*, 513 F.2d at 1063).

59. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980-81 (1978) (footnotes omitted).

60. *Id.* at 982-84.

61. *Id.* at 982.

62. *In re WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (1978).

63. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 983 (1978).

license is designated for either a revocation hearing or a renewal hearing to sell the license to an FCC-approved minority enterprise.⁶⁴ Normally, a licensee may not assign or transfer a license that comes into question until the FCC has resolved its doubts in a noncomparative hearing.⁶⁵ The distress sale policy is an exception to the rule and gives licensees a substantial incentive to exercise this option.⁶⁶ Under the distress sale, the licensee has two options: (1) the licensee may gamble that it will prevail in a noncomparative hearing, but if it loses, the FCC will take over the station without compensation; or (2) the licensee may sell via a distress sale before the hearing and still salvage some portion of the value of the license.⁶⁷ Finally, the FCC adopted a tax certificate program, which defers a licensee's capital gains tax if it sells to a minority buyer.⁶⁸ The first two minority preference programs were at issue in *Metro Broadcasting*.⁶⁹

B. Winter Park Communications, Inc. v. F.C.C. / Metro Broadcasting, Inc. v. F.C.C.

1. Statement of Facts

In 1982, the FCC assigned a new television channel to Orlando, Florida.⁷⁰ The following year, mutually exclusive⁷¹ applications to build and operate the television station were filed with the FCC by three entities: Metro Broadcasting, Incorporated ("Metro"), Winter Park Communications, Incorporated ("Winter"), and Rainbow Broadcasting Company ("Rainbow").⁷² An administrative law judge issued a decision awarding the channel to Metro.⁷³ The FCC Review Board then reversed and ruled that Rainbow's proposal was both quantitatively and qualitatively superior to Metro's.⁷⁴ Specifically, Rainbow was awarded prefer-

64. Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 851 (1982).

65. *Jefferson Radio Co. v. F.C.C.*, 340 F.2d 781, 783 (D.C. Cir. 1964).

66. *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*, 876 F.2d 902, 904 (D.C. Cir. 1989), *rev'd sub nom. Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990).

67. *Id.*

68. Bruce R. Wilde, *FCC Tax Certificates for Minority Ownership of Broadcasting Facilities: A Critical Reexamination of Policy*, 138 U. PA. L. REV. 979, 981 (1990). This program was not at issue in *Metro Broadcasting*, and will not be discussed further in this note.

69. 110 S. Ct. 2997, 3002 (1990).

70. *Winter Park Communications, Inc. v. F.C.C.*, 873 F.2d 347, 349 (D.C. Cir. 1989), *aff'd sub nom. Metro Broadcasting v. F.C.C.*, 110 S. Ct. 2997 (1990).

71. Applicants are considered mutually exclusive when the two proposed stations would be incompatible technologically. *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 332-33 (1945). See *Metro Broadcasting*, 110 S. Ct. at 3004 n.5.

72. *Winter Park*, 873 F.2d at 349.

73. *In re Metro Broadcasting, Inc.*, 96 F.C.C.2d 1073, 1088 (1983).

74. Brief Amicus Curiae of The National Association of Black Owned Broadcasters, Inc.

ence based on the ninety percent minority participation of its owners and the significant broadcast experience of one of its owners.⁷⁵

The FCC then denied review,⁷⁶ prompting Winter and Metro to appeal. Prior to the case being heard by the District of Columbia Court of Appeals, however, the FCC held the proceedings in abeyance pending further examination of the validity of its minority and female ownership policies.⁷⁷ When the FCC announced the possibility of terminating its affirmative action policies in 1987, Congress responded by signing a resolution into law forbidding the FCC from using any of its appropriated funds "to repeal, to retroactively apply changes in, or to continue a reexamination of" its policies regarding minority and female ownership of broadcasting licenses.⁷⁸ In compliance with this legislation, the FCC reactivated the case and affirmed its earlier order granting Rainbow's application.⁷⁹ The case returned to the court of appeals, and a divided panel affirmed the FCC's order awarding the license to Rainbow.⁸⁰ Metro then appealed to the Supreme Court.⁸¹

2. The Court of Appeals' Holding

In *Winter Park*, the District of Columbia Court of Appeals relied on *West Michigan Broadcasting Co. v. F.C.C.* ("*West Michigan*")⁸² in finding the minority preference policy constitutional.⁸³ The majority noted that the *West Michigan* court upheld the same minority preference policy for two principal reasons.⁸⁴ First, the policy was not a rigid quota system, but rather "a consideration of minority status as but *one factor* in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters."⁸⁵ Second, the court found that Congress' authorization to the FCC to award minority preferences in lotteries⁸⁶

and Congressman Edolphus Towns in Support of Respondents at 3, *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990) (No. 89-453).

75. *In re Metro Broadcasting, Inc.*, 99 F.C.C.2d 688, 703-4 (Rev. Bd. 1984), *rev. denied*, FCC 85-558 (released Oct. 18, 1985).

76. *In re Metro Broadcasting, Inc.*, No. 83-140, 1985 F.C.C. LEXIS 2415, slip op. at 2 (Oct. 18, 1985).

77. Notice of Inquiry on Racial, Ethnic or Gender Classifications, 1 F.C.C.R. 1315 (1986).

78. Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987).

79. *In re Metro Broadcasting, Inc.*, 3 F.C.C.R. 866 (1988).

80. *Winter Park*, 873 F.2d at 349.

81. *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3007 (1990).

82. 735 F.2d 601 (D.C. Cir. 1984).

83. *Winter Park*, 873 F.2d at 349.

84. *Id.* at 353.

85. *Id.* (emphasis in original).

86. In 1982, Congress amended 47 U.S.C. 309(i) to authorize the FCC to award minority preferences in lotteries. 47 U.S.C. § 309(i)(1) (1982).

"showed clear recognition of the extreme underrepresentation of minorities and their perspectives in the broadcast mass media"⁸⁷ due to "past inequities stemming from racial and ethnic discrimination."⁸⁸ Finally, the majority concluded that the Supreme Court's *Croson*⁸⁹ decision did not undermine the validity of *West Michigan*.⁹⁰ The court held that *Croson* did not affect the FCC's minority preference program, because the policy was flexible with no "quotas or fixed targets" and had gained "Congress' express approval."⁹¹

The dissent disagreed with the court's constitutional analysis and concluded that *Croson* "largely undermined" the validity of *West Michigan*.⁹² In the dissent's view, the FCC's asserted diversity rationale failed the strict scrutiny standard used in *Croson*,⁹³ because no evidence indicated minority ownership would promote minority programming.⁹⁴ The dissent reaffirmed the *Croson* Court's concern, in noting that the FCC's assumption that race predicted conduct was based on racial stereotyping.⁹⁵ The dissent did not find the minority preference policy unconstitutional, but instead would have remanded the case to the FCC for further fact-finding.⁹⁶

C. Shurberg Broadcasting of Hartford, Inc. v. F.C.C.

1. Statement of Facts

The dispute in *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*⁹⁷ arose from a series of attempts by Faith Center, Incorporated ("Faith") to execute a minority distress sale.⁹⁸ In December 1983, Shurberg Broadcasting of Hartford, Incorporated ("Shurberg") applied to the FCC for a permit that was mutually exclusive⁹⁹ of Faith's renewal appli-

87. *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 613 (D.C. Cir. 1984).

88. H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. 43 (1982), *reprinted in* 1982 U.S.C.A.N. 2261, 2287.

89. 488 U.S. 469 (1989).

90. *Winter Park*, 873 F.2d at 354-55.

91. *Id.*

92. *Id.* at 356 (Williams, J., concurring in part and dissenting in part).

93. *Id.* at 361. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.); *id.* at 520 (Scalia, J., concurring).

94. *Winter Park*, 873 F.2d at 358.

95. *Id.* at 361 (Williams, J., concurring in part and dissenting in part).

96. *Id.* at 369.

97. 876 F.2d 902 (D.C. Cir. 1989), *rev'd sub nom. Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990).

98. *In re Faith Center, Inc.*, 88 F.C.C.2d 788, 788 (1981).

99. Applicants are considered mutually exclusive when the two proposed stations would be incompatible technologically. *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 332 (1945).

cation for a channel in Hartford, Connecticut.¹⁰⁰ Before the FCC ruled on the application, however, Faith sought the FCC's approval for a distress sale, requesting permission to sell its license to minority applicant Astroline Communications Company ("Astroline").¹⁰¹ The FCC approved Faith's petition and allowed Faith to assign its broadcast license to Astroline without a comparative proceeding.¹⁰²

Shurberg appealed the FCC order to the United States Court of Appeals for the District of Columbia Circuit, but disposition was delayed pending completion of the FCC's inquiry into its minority ownership policies.¹⁰³ After Congress passed the appropriations legislation,¹⁰⁴ however, the FCC reaffirmed its order granting Faith's request.¹⁰⁵ A divided court of appeals invalidated the order and held that the FCC's minority distress sale policy was unconstitutional.¹⁰⁶ Astroline then appealed to the Supreme Court.¹⁰⁷

2. The Court of Appeals' Holding

The court of appeals in *Shurberg* held per curiam¹⁰⁸ that the minority distress sale was unconstitutional under the standard of strict scrutiny.¹⁰⁹ Judge Silberman first rejected the distress sale program as a remedy for past discrimination because he found: (1) the program was not tied to the effects of prior discrimination; (2) the FCC had not considered race-neutral alternatives; and (3) the program imposed an undue burden on applicant Shurberg.¹¹⁰ Judge Silberman accepted the program's diversity goal as a compelling governmental purpose, but rejected the minority ownership and programming diversity nexus.¹¹¹ Judge MacKinnon concurred in the judgment but disagreed pointedly with Silberman's rejection of the nexus between diversity of station ownership

100. *Shurberg*, 876 F.2d at 905.

101. *Id.*

102. *In re Faith Center, Inc.*, 99 F.C.C.2d 1164 (1984), *rev'd on other grounds*, *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*, 876 F.2d 902 (1989).

103. *In re Metro Broadcasting Inc.*, 1985 F.C.C. LEXIS 2415, No. 83-1408, slip op. at 2 (Oct. 18, 1985).

104. Notice of Inquiry on Racial, Ethnic or Gender Classifications, 1 F.C.C.R. 1315 (1986).

105. *In re Faith Center, Inc.*, 3 F.C.C.R. 868 (1988).

106. *Shurberg*, 876 F.2d at 902.

107. *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3008 (1990).

108. "By the court. A phrase used to distinguish an opinion of the whole court from an opinion written by any one judge." BLACK'S LAW DICTIONARY 1023 (5th ed. 1979).

109. *Shurberg*, 876 F.2d at 926.

110. *Id.* at 915-18.

111. *Id.* at 920-21.

and diversity of programming.¹¹² He held that a nexus existed, but found the program not narrowly tailored because of the unlimited number of licenses that could be transferred.¹¹³

Chief Judge Wald dissented, arguing that the majority rejected "a thoughtfully conceived and monitored program aimed at attaining a legitimate congressionally mandated end."¹¹⁴ She rejected the notion that courts can inspect the adequacy of deliberations by Congress, and found a nexus between minority ownership and programming.¹¹⁵ Chief Judge Wald concluded that promotion of diverse programming was a compelling interest and that the program was constitutional.¹¹⁶ In addition, she found no undue burden because "the near-monopoly exercised by nonminorities over broadcast media—they control approximately 98% [ninety-eight percent] of all broadcast licenses—and the very limited circumstances in which the distress sale policy can be invoked, suggest that the burden the policy places on nonminority applicants is acceptable."¹¹⁷

III. THE OPINION OF THE SUPREME COURT

A. *The Majority Opinion*

In *Metro Broadcasting*, Justice Brennan, joined by Justices Marshall, White, Blackmun, and Stevens, upheld the two minority¹¹⁸ preference programs at issue.¹¹⁹ The Court began its analysis by pointing out that Congress had specifically approved the FCC policies.¹²⁰ The Court declared that "when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are 'bound to approach our task with appropriate deference to the Congress.'"¹²¹ Instead of applying a strict level of scrutiny, the

112. "[I]t is difficult to dispute the assertion that Congress found there was a nexus between minority ownership and programming diversity." *Id.* at 932 (MacKinnon, J., concurring).

113. *Id.* at 931. The fact that only thirty-eight licenses have been distributed via distress sales in ten years clearly disputes this argument. *Id.* at 937 (Wald, C.J., dissenting).

114. *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*, 876 F.2d 902, 934 (D.C. Cir. 1989), *rev'd sub nom. Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990) (Wald, C.J., dissenting).

115. *Id.* at 944-48.

116. *Id.* at 947.

117. *Id.* at 952 (footnote omitted).

118. A minority is defined as "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 980 n.8 (1978).

119. 110 S. Ct. 2997, 3028 (1990).

120. *Id.* at 3008.

121. *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (Burger, C.J., joined by White and Powell, JJ.)).

Supreme Court adopted the less restrictive test of intermediate scrutiny, which requires a program to be substantially related to an important governmental objective.¹²² Under intermediate scrutiny, the Court held, "benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."¹²³ The Supreme Court found that Congress and the FCC had selected the minority ownership policies primarily to promote diversity,¹²⁴ which was an important governmental objective.¹²⁵

In addressing the second prong of the test, the Supreme Court deferred to the FCC and Congress.¹²⁶ The Court considered the observations in the FCC's *Statement of Policy on Minority Ownership of Broadcasting Facilities*, which declared that minority ownership was a "significant way of fostering the inclusion of minority views in the area of programming" and that "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming."¹²⁷ The Court pointed to recent congressional action requiring the FCC to maintain their programs without alteration¹²⁸ and the long history of congressional support for minority preference policies.¹²⁹ The legislative history states: "Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy

122. *Id.* at 3008.

123. *Id.* at 3008-09.

124. The Court previously held that safeguarding the public's right to receive diverse views was an integral part of the FCC's mission. *Kay A. Hoogland, Metro Broadcasting, Inc. v. F.C.C.: Nonremedial Affirmative Action Becomes an Exclusive Prerogative of Congress*, 16 EMPLOYEE REL. L.J. 301, 306 (Winter 1990/91). "The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience." *Metro Broadcasting*, 110 S. Ct. at 3011.

125. *Metro Broadcasting*, 110 S. Ct. at 3010. In support of this, the Court applied the scarcity rationale, stating that "because of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* (quoting *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969)). But see Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U.L. REV. 401 (1989), for an argument that the scarcity rationale has been eroded with the advent of technology.

126. *Metro Broadcasting*, 110 S. Ct. at 3019-25.

127. 68 F.C.C.2d 979, 981 (1978).

128. *Metro Broadcasting*, 110 S. Ct. at 3012. The Court referred to the appropriations legislation enacted by Congress. Notice of Inquiry on Racial, Ethnic or Gender Classifications, 1 F.C.C.R. 1315 (1986).

129. *Metro Broadcasting*, 110 S. Ct. at 3012-16.

goals."¹³⁰

The Court next observed that the race-conscious programs at issue did not rest on impermissible stereotypes.¹³¹ The FCC did not assert that *all* minority owners would provide diverse programming; rather, it claimed that increased minority ownership would, in the aggregate, result in diversity.¹³² The Court found that the nexus between diversity and minority ownership was further evidenced by studies showing that minority ownership impacts broadcasting by affecting the images portrayed in local news, including the amount of time devoted to minority issues, the number of minority employees, and the avoidance of racial and ethnic stereotype images.¹³³ The Court found the policies narrowly tailored because the FCC had considered other race-neutral alternatives and the policies would be periodically reviewed by the FCC and Congress.¹³⁴

Justice Stevens, in his separate concurrence, endorsed a forward-looking or future benefit approach to affirmative action.¹³⁵ He also praised the Court for explicitly rejecting the proposition that a racial classification can be used only as a remedy for past discrimination.¹³⁶ Thus, a majority of the Court upheld the two minority preference policies at issue by applying intermediate scrutiny.¹³⁷ The Court held the preference programs withstood intermediate scrutiny because the programs were substantially related to the important governmental goal of

130. H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. 40 (1982).

131. *Metro Broadcasting*, 110 S. Ct. at 3016 (emphasis added).

132. *Id.*

133. *Kay A. Hoogland, Metro Broadcasting, Inc. v. F.C.C.: Nonremedial Affirmative Action Becomes an Exclusive Prerogative of Congress*, 16 EMPLOYEE REL. L.J. 301, 307 (Winter 1990/91). The dissenting opinions argued that no relation existed between the multiculturalism of programming and the race of the station owners. Others have argued that "clearly there is *some* relation between programming and the beliefs of an owner" because a relation exists between "one's heritage and one's beliefs." Patricia J. Williams, *Metro Broadcasting, Inc. v. F.C.C.: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 533 (1990) (emphasis in original).

For example, the Congressional Research Service (CRS) found a strong correlation between minority ownership and diversity of programming. See CRS, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (June 29, 1988). Only twenty percent of stations with no African-American ownership attempted to direct programming to African-Americans versus sixty-five percent of those with African-American ownership. See *id.* at 13. In addition, only ten percent of those stations without Hispanic ownership targeted Hispanic programming, while fifty-nine percent of stations with Hispanic owners did so. See *id.* at 13, 15.

134. *Metro Broadcasting*, 110 S. Ct. at 3019-25.

135. *Id.* at 3028 (Stevens, J., concurring).

136. *Id.*

137. *Id.* at 3008-09.

IV. ANALYSIS

A. Prior Case Law

Before the Supreme Court's decision in *Metro Broadcasting*, the Court had discussed numerous times the legality of benign programs that used race or gender as allocative criteria to benefit minority groups.¹⁴⁸ In the last twelve years, the Court has struggled with the constitutionality of government-sponsored minority preferences in four main cases: *Regents of the University of California v. Bakke*,¹⁴⁹ *Fullilove v. Klutznick*,¹⁵⁰ *Wygant v. Jackson Board of Education*,¹⁵¹ and *City of Richmond v. J.A. Croson Co.*¹⁵² The Supreme Court's fractured decisions addressing the subject reflect the complexity of the constitutional issues.¹⁵³ These four

148. Brief Amicus Curiae of the American Civil Liberties Union, The New York City Commission on Human Rights, and The NOW Legal Defense and Education Fund in Support of Petitioner in No. 89-700 and in Support of Respondents in No. 89-453 at 4, *Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.*, 110 S. Ct. 2997 (1990) (No. 89-700); *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990) (No. 89-453). See, e.g., *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987) (upholding under Title VII a voluntary plan adopted by a public employer that used female gender as a "plus" factor to determine promotions in "traditionally segregated" jobs); *United States v. Paradise*, 480 U.S. 149 (1987) (upholding judicially imposed racial quota for promotions, in order to remedy persistent violations of Title VII); *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986) (upholding consent decree settling Title VII case extending race-conscious hiring and promotion to benefit nonvictims of proven racial discrimination); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (invalidating unauthorized modification of Title VII consent decree to provide for race-conscious layoffs in derogation of bona fide seniority system); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (excluding students from women's school of nursing based solely on gender violated Equal Protection Clause); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (upholding under Title VII a voluntarily established race-conscious promotion system designed to remedy the effects of past industry-wide discrimination); *International Bhd. of Teamsters v. U.S.*, 431 U.S. 324 (1977) (protecting rights under bona fide seniority systems, even when it perpetuates the effects of past racial discrimination); *United Jewish Org. v. Carey*, 430 U.S. 144 (1977) (upholding use of racial criterion to enhance success of minority candidates in redistricting); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (invalidating presumption of widow dependency because not based on remedial purpose); *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating gender discrimination in access to beer because not based on a remedial purpose); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747 (1976) (upholding race-conscious remedies in Title VII cases); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (invalidating Social Security benefits confined to widows because purpose was not remedial); *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding employment preferences for American Indians in the Bureau of Indian Affairs).

149. 438 U.S. 265 (1978).

150. 448 U.S. 448 (1980).

151. 476 U.S. 267 (1986).

152. 488 U.S. 469 (1989).

153. "The doctrinal development of these principles . . . was marred by constantly shifting coalitions of Justices and ambiguous, sometimes contradictory pronouncements in a multitude of majority, plurality, concurring, and dissenting opinions." Mary C. Daly, *Affirmative Action, Equal Access and the Supreme Court's 1988 Term: The Rehnquist Court Takes a Sharp Turn*

promoting diversity.¹³⁸

B. *The Dissenting Opinions*

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, characterized the majority decision as a strong departure from prior precedent, noting that *City of Richmond v. J.A. Croson Co.*¹³⁹ required the Court to apply strict scrutiny to race-based classifications.¹⁴⁰ The dissent stated that *Metro Broadcasting* did not implicate a lower level of scrutiny because the same standard of review should apply to both the federal and state governments.¹⁴¹ The dissenters argued that the programs failed the applicable strict scrutiny standard of review.¹⁴²

Under strict scrutiny, the dissent found that program diversity was not a compelling governmental interest.¹⁴³ According to Justice O'Connor, "[m]odern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination."¹⁴⁴ Under the second prong of strict scrutiny, she found that the programs were not narrowly tailored because no method existed to define or measure a particular viewpoint associated with race.¹⁴⁵ In a separate dissenting opinion, Justices Kennedy and Scalia equated the majority's reasoning, in upholding the minority preference programs, to that used in *Plessy v. Ferguson*¹⁴⁶ and the apartheid laws in South Africa.¹⁴⁷

138. *Id.*

139. 488 U.S. 469 (1989).

140. "To uphold the challenged programs, the Court departs from these fundamental principles [that the government may not allocate benefits to individuals based on the assumption that race determines how they act] and from our traditional requirement that racial classifications are permissible only if necessary and narrowly tailored to achieve a compelling interest." *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3029 (1990) (O'Connor, J., joined by Rehnquist, C.J., Scalia and Kennedy, JJ., dissenting).

141. *Id.* at 3030.

142. *Id.* at 3034.

143. *Id.*

144. *Id.*

145. *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3037 (1990) (O'Connor, J., joined by Rehnquist, C.J., Scalia and Kennedy, JJ., dissenting).

146. 163 U.S. 537 (1896). In *Plessy*, the Court upheld a law mandating segregation on railroads based upon a purported interest in the riding pleasure of railroad passengers and promulgated the infamous "separate but equal" doctrine, which was overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954).

147. *Metro Broadcasting*, 110 S. Ct. at 3044-46 (Kennedy, J. joined by Scalia, J., dissenting). "With a logic both heartless and hollow, they [Justices Kennedy and Scalia] likened the FCC's racial classification to South Africa's apartheid laws, a comparison that surely would bemuse Nelson Mandela." *A Genuinely Affirmative Action*, N.Y. TIMES, July 2, 1990, at A14.

cases have generated more than twenty opinions, almost all of which discuss the constitutional issue of whether the programs violate the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁴

The Court decided three of the above-referenced cases without establishing the proper standard of review for affirmative action or benign race classifications.¹⁵⁵ The Supreme Court's first major collision with minority preferences occurred in *Regents of the University of California v. Bakke* ("Bakke"),¹⁵⁶ where the Court struck down a university's admission program that set aside a specific number of places for minority candidates.¹⁵⁷ A majority of the Court recognized,¹⁵⁸ however, that a university has a compelling interest in promoting a diverse educational environment,¹⁵⁹ and stated that universities may use race as a factor in their admission decisions.¹⁶⁰ Four of the five Justices who reached the

to the Right, 18 HOFSTRA L. REV. 1057, 1060 (1990). See also Mary C. Daly, *Some Runs, Some Hits, Some Errors - Keeping Score in the Affirmative Action Ballpark From Weber to Johnson*, 30 B.C. L. REV. 1 (1988).

154. Additionally, in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), a majority of the Court never joined one opinion.

155. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 670 (2d ed. 1983).

156. 438 U.S. 265 (1978).

157. *Id.* at 408-21 (Stevens, J., joined by Burger, C.J., Stewart and Rehnquist, JJ., concurring in part and dissenting in part). The Court divided, however, on the correct reasoning behind the decision. Four members of the Court—Justices Burger, Stevens, Stewart, and Rehnquist—found that the program violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d)-2000(d)(4) (1976), and thus did not reach the constitutional issue. The Justices held that Title VII of the Civil Rights Act prohibited exclusion of anyone on account of race. *Bakke*, 438 U.S. at 412-21 (Stevens, J. concurring in part and dissenting in part, joined by Burger, C.J., Stewart and Rehnquist, JJ.). Justice Powell alone held that the program was unconstitutional. *Id.* at 315-20 (Powell, J.). In contrast, Justices Brennan, Blackmun, Marshall, and White would have upheld the program because they did not find a Title VII or an equal protection violation. *Id.* at 349 (Brennan, J., concurring in part and dissenting in part, joined by White, Marshall, and Blackmun, JJ.).

158. Justices Powell, Brennan, Blackmun, White, and Marshall.

159. *Bakke*, 438 U.S. at 311-14 (Powell, J.).

160. Justices Powell, Brennan, White, Marshall, and Blackmun formed a majority, holding that the University could have used race as a factor in admission decisions. Four of these Justices would have upheld the University of California at Davis ("U.C. Davis") program under the Equal Protection Clause on the ground that the program was designed to serve an important interest in "remediating the effects of past societal discrimination." *Id.* at 362 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). The Court found that "state educational institutions need not be color-blind" and may confront the realities of race discrimination with a properly implemented admissions program. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1529 (2d ed. 1988) (citing *Bakke*, 438 U.S. at 320 (opinion of Powell, J., joined by White, Brennan, Marshall, and Blackmun, JJ.)).

Justice Powell, however, rejected the U.C. Davis program because he felt the goal of diversity could only be pursued by considering minority status as a factor in the admissions process, not by a rigid quota program. *Bakke*, 438 U.S. at 317 (Powell, J.). He also rejected

constitutional issue articulated an intermediate level of scrutiny, which requires a program to be substantially related to an important governmental interest.¹⁶¹ Justice Powell alone argued that all racial classifications should be subject to strict scrutiny.¹⁶²

In *Fullilove v. Klutznick* ("*Fullilove*"),¹⁶³ the Court upheld the use of a minority quota program analogous to the one struck down in *Bakke*.¹⁶⁴ The six-to-three decision in *Fullilove* established the legitimacy of affirmative action programs;¹⁶⁵ however, no single theory commanded the votes of more than three justices.¹⁶⁶ In the plurality opinion, Chief Justice Burger found the program permissible for two reasons: (1) Congress' special power under the Fourteenth Amendment allowed it to enact measures to remedy past discrimination;¹⁶⁷ and (2) the allocation of federal funds contingent on the use of minority preferences constituted a valid way of implementing that objective.¹⁶⁸ As in *Bakke*, however, the

the preference as a remedy for past discrimination because the university had not made any specific findings of discrimination. *Id.* at 307-09. "[T]he purpose of helping certain groups whom the . . . [s]chool perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent." *Id.* at 310.

161. *Id.* at 359 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., dissenting in part and concurring in part). Under intermediate scrutiny, they found the plan served the important governmental purpose of remedying the effects of past societal discrimination and was substantially related to that objective. *Id.* at 362.

Justice White's position on the applicable standard is unclear. He joined the portion of Justice Powell's opinion that called for strict scrutiny, but he also stated that on equal protection issues, he joined the opinions of Justices Brennan, Marshall, and Blackmun. *See id.* at 387 n.7 (White, J.). It would appear that Justice White believes that all truly benign affirmative action programs will pass strict scrutiny. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 670 n.50 (2d ed. 1983).

162. *Bakke*, 438 U.S. at 315-20 (Powell, J.).

163. 448 U.S. 448, 492 (1980) (Burger, C.J., joined by White and Powell, JJ.).

164. 438 U.S. at 408-21 (Stevens, J., joined by Burger, C.J., Stewart and Rehnquist, JJ.). The *Fullilove* Court upheld a program that set aside ten percent of its total funds for minority business enterprises under the Public Works Employment Act, 42 U.S.C. §§ 6701-6736 (1982). 448 U.S. at 453, 492 (Burger, C.J., joined by White and Powell, JJ.). Minority business enterprise is defined as "a business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." 42 U.S.C. § 6705(f)(2) (1982). Minorities are defined as "Negroes [African-Americans], Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts" who are United States citizens. *Id.*

165. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1533 (2d ed. 1988).

166. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 678 (2d ed. 1983).

167. *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*, 876 F.2d 902, 911 (D.C. Cir. 1989), *rev'd sub nom. Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990). *See Fullilove*, 448 U.S. at 472-78 (Burger, C.J., joined by White and Powell, JJ.).

168. Jennifer M. Bott, Note, *From Bakke to Croson: The Affirmative Action Quagmire and the D.C. Circuit's Approach to FCC Minority Preference Policies*, 58 GEO. WASH. L. REV. 845, 849 (1990) (citing *Fullilove*, 448 U.S. 480-92 (Burger, C.J., joined by White and Powell, JJ.)).

Court rendered its decision without definitively mandating a level of scrutiny for determining the constitutionality of affirmative action programs.¹⁶⁹ Chief Justice Burger upheld the programs without applying a standard of review,¹⁷⁰ while Justices Marshall, Brennan, and Blackmun upheld the program under intermediate scrutiny.¹⁷¹ Justices Stewart, Rehnquist, and Stevens dissented because of their steadfast opposition to the use of racial classifications for granting government benefits.¹⁷²

In *Wygant v. Jackson Board of Education* ("Wygant"),¹⁷³ the Supreme Court¹⁷⁴ invalidated a layoff protection plan for minority teachers.¹⁷⁵ Members of the majority filed three separate opinions. Justice

169. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 678 (2d ed. 1983).

Justice Burger, however, repudiated the theory that Congress was to act in a color-blind manner, holding that "innocent parties" may be constitutionally required to "share the burden" of affirmative action programs intended to "cure the effects of prior discrimination." *Fullilove*, 448 U.S. at 482-84 (Burger, C.J., joined by White and Powell, JJ.). Additionally, he held that "it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." *Id.* at 485. Justices Powell, Brennan, Marshall, and Blackmun concurred in the judgment.

170. *Fullilove*, 448 U.S. at 472-78 (Burger, C.J., joined by White and Powell, JJ.).

171. *Id.* at 519 (Marshall, J., joined by Brennan and Blackmun, JJ., concurring).

172. "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid." *Id.* at 523. In his dissenting opinion, Justice Stewart took the position that the Equal Protection Clause prohibits any governmental entity from using race as a basis for allocating benefits and burdens. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 681 (2d ed. 1983). He and Justice Rehnquist maintained the traditional argument that "[o]ur Constitution is color-blind," stating that "any official action that treats a person differently on account of his race or ethnic origin is . . . invalid." *Fullilove*, 448 U.S. at 522-23 (Stewart, J., joined by Rehnquist, J., dissenting) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559-60 (1896) (Harlan, J. dissenting)). Justice Stevens, in a separate dissent, also took a strong position against affirmative action in allowing racial classifications only for those groups who have suffered a "special wrong." *Fullilove*, 448 U.S. at 537 (Stevens, J. dissenting).

Justice Brennan's response to the theory that the Constitution is color-blind is that "we cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." *Bakke*, 438 U.S. at 327 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). For a revisionist reading of the color-blind theory, see Laurence H. Tribe, *In What Vision of the Constitution Must the Law be Colorblind?*, 20 J. MARSHALL L. REV. 201, 203 (1986).

173. 476 U.S. 267 (1986).

174. As Justice O'Connor concurred based on narrow grounds and no other opinion was joined by five justices, her concurrence and those parts of Justice Powell's opinion in which she concurred represent the holding of the Court. *Shurberg*, 876 F.2d at 911. See *Marks v. United States*, 430 U.S. 188, 193 (1977).

175. 476 U.S. at 273 (opinion of Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ.). Even though there was no majority opinion, *Wygant* nonetheless illustrates that the Court does not believe racial preferences are invalid per se. Jennifer M. Bott, Note, *From Bakke to Croson: The Affirmative Action Quagmire and the D.C. Circuit's Approach to FCC Minority Preference Policies*, 58 GEO. WASH. L. REV. 845, 851 (1990); Tamar

Powell, writing for the plurality, subjected the program to strict scrutiny and found no evidence to establish a compelling state interest.¹⁷⁶ He rejected both the "role model" theory¹⁷⁷ and the societal discrimination theory as insufficient compelling interests.¹⁷⁸ The plurality then distinguished between a hiring plan for minorities and a layoff scheme, and found the latter not narrowly tailored because it was more intrusive.¹⁷⁹

Justice O'Connor wrote separately and concluded that the hiring goal at issue was not narrowly tailored because it was incorrectly tied to percentages of minority teachers and minority students, rather than to percentages of qualified minority teachers in the labor pool.¹⁸⁰ Justice

Fruchtmann, Note, *City of Richmond v. J.A. Croson Co.: Charting a Course Through the Supreme Court's Affirmative Action Decisions*, 17 HASTINGS CONST. L.Q. 699, 707 (1990).

"It is interesting that Justice Rehnquist joins the *Wygant* plurality because the reasoning [allowance of racial classifications to remedy prior discrimination] is contrary to the *Fullilove* dissent in which he advocated the 'colorblind Constitution.'" *Id.* (quoting *Fullilove*, 448 U.S. at 522 (Stewart, J., joined by Rehnquist, J., dissenting)).

176. *Wygant*, 476 U.S. at 277-78 (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ.).

177. The school board had argued that the layoff protection plan preserved minority teachers who were "role models" for minority students. *Id.* at 274.

178. *Id.* at 278.

179. Justice Powell noted that layoff schemes were more intrusive for three reasons. First, "[i]n cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." *Id.* at 282 (emphasis in original). Second, "the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker owns . . ." *Id.* at 283 (quoting Richard Fallon, Jr. & Paul Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 S. CT. REV. 1, 58 (1984)). Third, "layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives." *Wygant*, 476 U.S. at 283 (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ.).

180. *Wygant*, 476 U.S. at 294 (O'Connor, J., concurring in part and concurring in judgment). Justice O'Connor recognized that the Court, though disagreeing on the applicable standard, was in accord in its belief that a public employer can undertake an affirmative action program if it is in furtherance of a "legitimate remedial purpose" and its means do not impose "disproportionate harm" on innocent individuals. *Id.* at 287. Further, she stated that if contemporaneous findings of discrimination were required, the value of evidentiary advantages would diminish because they could only be secured at the expense of other vitally important values. *Id.* at 290.

It is interesting to note Justice O'Connor's view in *Wygant* because it appears to contradict her majority opinion in *Croson*, where she required a state government to prove specific and identifiable past discrimination in order to withstand strict scrutiny. See *infra* notes 182-194 and accompanying text. Justice O'Connor stated:

If contemporaneous findings were required of public employers in every case as a precondition to the constitutional validity of their affirmative action efforts, however, the relative value of these evidentiary advantages would diminish, for they could be secured only by the sacrifice of other vitally important values.

The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. This result would clearly be at odds with this Court's

Marshall, joined by Justices Brennan and Blackmun, dissented and would have upheld the plan under either intermediate or strict scrutiny because they asserted a public employer should be allowed to preserve the benefits of a legitimate and constitutional hiring plan.¹⁸¹ In a separate dissent, Justice Stevens also found the program constitutional because he concluded the school had a legitimate interest in employing more African-American teachers in the future.¹⁸²

In summary, a majority of the Supreme Court had never established a standard of review for affirmative action programs or benign racial classifications prior to the decision in *City of Richmond v. J.A. Croson Co.* ("*Croson*").¹⁸³ In *Bakke*, four members of the Court subjected the program at issue to intermediate scrutiny, and one member subjected the program to strict scrutiny.¹⁸⁴ In *Wygant*, four justices held the challenged program unconstitutional by subjecting the race-based classification to strict scrutiny, while three members voted to uphold the program under either intermediate or strict scrutiny.¹⁸⁵ In *Fullilove*, the only major decision that upheld an affirmative action program, the six-member majority did not establish a standard of review.¹⁸⁶ Finally in 1989, a majority of the Court agreed on a standard of review for programs based on race.¹⁸⁷ The Supreme Court in *Croson* appeared to establish a strict scrutiny standard of review for all race-based classifications, even those that benefited minorities.¹⁸⁸

In *Croson*, the Court invalidated Richmond's Minority Business

and Congress' consistent emphasis on the value of voluntary efforts to further the objectives of the law.

Wygant, 476 U.S. at 290 (O'Connor, J., concurring in part and concurring in judgment) (emphasis in original) (citations and quotations omitted).

181. *Id.* at 303 (Marshall, J., dissenting).

182. *Id.* at 313 (Stevens, J., dissenting).

183. 488 U.S. 469 (1989).

184. Justices Brennan, Marshall, White, and Blackmun would have upheld the program under intermediate scrutiny. *Bakke*, 438 U.S. at 362 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.). In contrast, Justice Powell struck down the program under strict scrutiny. *Id.* at 315-20 (Powell, J.).

185. Justice Powell, joined by three other justices in his plurality opinion, subjected the program to strict scrutiny and invalidated the program. *Wygant*, 476 U.S. at 277-78 (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ.). While Justices Marshall, Brennan and Blackmun would have upheld the plan under either intermediate or strict scrutiny. *Id.* at 303 (Marshall, J., dissenting).

186. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 678 (2d ed. 1983).

187. The Court applied strict scrutiny to ensure "the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.). See Robert E. Suggs, *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257, 1257 (1991).

188. "[T]he standard of review under the Equal Protection Clause is not dependent on the

Utilization Plan,¹⁸⁹ which required prime contractors who were awarded city construction employment to subcontract at least thirty percent of each dollar amount to minority business enterprises.¹⁹⁰ Although Richmond's plan was patterned after the exact plan upheld in *Fullilove*,¹⁹¹ the majority¹⁹² found this plan unconstitutional.¹⁹³ The Court invoked the strict scrutiny standard of review, requiring the government to demonstrate that the race-conscious program was "narrowly tailored" to achieve a "compelling interest."¹⁹⁴ The majority concluded that Richmond had failed to demonstrate a compelling interest because it did not show that Richmond had engaged in any past, specific, identifiable discrimination.¹⁹⁵

The dissenters of the Court advocated intermediate scrutiny for all

race of those burdened or benefited by a particular classification." *Croson*, 488 U.S. at 494 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).

189. *Id.* at 505 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia, and Kennedy, JJ.).

190. The plan defined a minority business enterprise as "[a] business at least fifty-one (51) percent of which is owned and controlled . . . by minority group members." Minorities were defined as United States citizens "who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* at 478 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia and Kennedy, JJ.) (quoting RICHMOND, VA., CODE § 12-23 (1985)).

191. *See supra* notes 160-67 and accompanying text.

192. Justice O'Connor wrote a six-part opinion in *Croson*. A majority of the Court agreed to parts I, III-B, and IV. The majority comprised Chief Justice Rehnquist, Justices O'Connor, Stevens, Scalia, Kennedy, and White. Part II of Justice O'Connor's opinion was joined only by Chief Justice Rehnquist and Justice White. Parts III-A and V were joined by Chief Justice Rehnquist and Justices White and Kennedy.

193. "[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Croson*, 488 U.S. at 498 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia and Kennedy, JJ.).

194. *Id.* at 505-07 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia and Kennedy, JJ.).

195. *Id.* at 505. The Court reached this conclusion even though abundant evidence was produced, including a study revealing that "while the general population of Richmond was 50% [fifty percent] black, only 0.67% [less than one percent] of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983." *Id.* at 479-80. Nonetheless, the Court held that "[t]here was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." *Id.* at 480.

Additionally, Richmond used congressional findings of discrimination in the construction industry nationwide, similar to the type of evidence relied on by the Court in *Fullilove*. *Id.* at 504 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia, and Kennedy, JJ.). In this case, however, the Court considered the findings irrelevant because it required particular findings of racial discrimination in Richmond's own construction industry. *See* David P. Stoelting, Note, *Minority Business Set-Asides Must be Supported by Specific Evidence of Prior Discrimination: City of Richmond v. J.A. Croson Co.*, 58 CIN. L. REV. 1097, 1112-13 (1990).

benign classifications¹⁹⁶ and would have upheld the plan as indistinguishable from the one in *Fullilove*.¹⁹⁷ As the case was decided by a six-to-three vote, *Croson* thus marked the first time a majority agreed on a standard of review for racially based programs.¹⁹⁸ Therefore, after *Croson*, it appeared that only those programs that could withstand strict scrutiny would be upheld.¹⁹⁹ The *Metro Broadcasting* Court, however, ignored this precedent and applied intermediate scrutiny to the minority preference programs at issue.²⁰⁰

B. The Differences Between Croson and Metro Broadcasting Do Not Mandate Disparate Treatment

The Supreme Court in *Metro Broadcasting* held that "benign race-conscious measures mandated by Congress" are subject only to intermediate scrutiny.²⁰¹ One year earlier in *Croson*, however, the same Court had invoked strict scrutiny for a similar program.²⁰² The two opinions clearly contradict each other. *Croson* requires the application of strict scrutiny to all race-based programs enacted by state governments,²⁰³ while *Metro Broadcasting* allows intermediate scrutiny to be applied to benign congressionally mandated preference programs.²⁰⁴ In subjecting the policies in *Metro Broadcasting* to a lower standard of review, the Court emphasized that the two programs at issue were benign affirmative action programs.²⁰⁵ The Court in *Croson*, however, held that "the stan-

196. *Croson*, 488 U.S. at 535 (Marshall, J., dissenting). The dissent argued that the plan was voluntarily enacted by the city of Richmond to benefit its minority population and noted that strict scrutiny had historically been reserved for only those cases involving invidious discrimination. *Id.* at 551-53.

Justice O'Connor replied that "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 493 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.). "Strict scrutiny of affirmative action plans in the future could result in their being upheld when they are designed to achieve diversity. But scrutiny that has been strict in name has most often been fatal in fact." Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1657 (1990).

197. *Croson*, 488 U.S. at 528 (Marshall, J., dissenting).

198. Jennifer M. Bott, Note, *From Bakke to Croson: The Affirmative Action Quagmire and the D.C. Circuit's Approach to FCC Minority Preference Policies*, 58 GEO. WASH. L. REV. 845, 853 n.59 (1990).

199. 488 U.S. at 494 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).

200. 110 S. Ct. 2997, 3008-09 (1990).

201. *Id.*

202. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.) (1989).

203. 488 U.S. at 493-508.

204. 110 S. Ct. at 3008-09.

205. *Id.* at 3008.

dard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."²⁰⁶

The differences between the affirmative action programs at issue must be analyzed in order to reconcile the two opinions. The two main distinctions are: (1) the program at issue in *Croson* was enacted by a state,²⁰⁷ rather than federally mandated;²⁰⁸ and (2) *Croson* involved a set-aside, or quota,²⁰⁹ rather than a preference scheme.²¹⁰ In contrast, *Metro Broadcasting* involved congressionally mandated preference policies.²¹¹ The Court in *Metro Broadcasting* placed great emphasis on these distinctions; however, the differences between the two programs are insignificant and do not mandate disparate treatment. While differences exist between the program invalidated in *Croson* and the programs upheld in *Metro Broadcasting*, these distinctions do not merit different levels of constitutional scrutiny.

1. The Distinction Between State and Federal Government

In *Metro Broadcasting*, the Court relied heavily on the fact that Congress had mandated the FCC minority preference policies.²¹² The

206. *Id.*

207. *Croson*, 488 U.S. at 477.

208. *Metro Broadcasting*, 110 S. Ct. at 3008.

209. *Croson*, 488 U.S. at 477-78.

210. Although both quotas and goals are temporary measures, a quota is seen as an absolute standard, while a goal is considered less mechanical. Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 335 (1990).

A quota is defined as a program that sets aside a certain number of places for minority candidates. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 309 (1985). An example of a quota type program is the program invalidated in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 408-21 (1978), which set aside sixteen places out of one hundred for minority students applying to the University of California at Davis medical school. Other examples include the programs at issue in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980). See *supra* notes 153-194 and accompanying text.

In contrast, a preference program is "a consideration of minority status as but one factor in a competitive multi-factor selection system that is designed to obtain a diverse mix." *Winter Park Communications, Inc. v. F.C.C.*, 873 F.2d 347, 353 (D.C. Cir. 1989), *aff'd sub nom. Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990) (emphasis in original).

211. 110 S. Ct. at 3008.

212. *Id.* There is an argument that Congress did not actually mandate the policies. Justice O'Connor argued in her dissent that the policies in *Metro Broadcasting* did not implicate Congress' special powers under section five because that section only empowers Congress to act respecting the states and this case concerned the administration of federal programs by federal officials. *Id.* at 3030 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia and Kennedy, JJ.). Additionally, one could argue that Congress did not actually mandate the programs at issue because they only acted through an appropriations legislation. Notice of Inquiry on Racial, Ethnic or Gender Classifications, 1 F.C.C.R. 1315 (1986). The appropriations riders merely prevent the FCC from reexamining its preference programs; if Congress ever declined

Court stated that "when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress," the Court must defer to Congress.²¹³ Congress has the power to "provide for the . . . general welfare of the United States" and "to enforce, by appropriate legislation," the Equal Protection Clause.²¹⁴ The Court added that such deference was appropriate due to "Congress' powers under the Commerce Clause, the Spending Clause, and the Civil War Amendments."²¹⁵ In contrast, the set-aside program in *Croson* was not mandated by any federal law or court, but instead had been voluntarily adopted by the elected legislature of Richmond to redress long-standing inequality.²¹⁶ The *Croson* plan was struck down under strict scrutiny,²¹⁷ while the *Metro Broadcasting* programs were upheld under intermediate scrutiny.²¹⁸

The strict scrutiny standard adopted by the majority in *Croson* is extremely difficult to meet. In order for an affirmative action plan to be upheld, the state or local government must prove specific, identifiable discrimination in its own community.²¹⁹ State and local governments are seriously deterred from enacting benign programs because to do so they must, in essence, admit to having been discriminatory in the past. Requiring states to provide documentation of identified discrimination discourages the enactment of affirmative action programs.²²⁰ In sum, if state legislatures are required to undergo strict scrutinization whenever they enact an affirmative action program, it is likely the implementation of these programs will be discontinued.

Because *Metro Broadcasting* did not overrule *Croson*,²²¹ the

to renew the rider, the FCC could rescind its policies. Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 140 (1990).

213. *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3008 (1990).

214. U.S. CONST. art. I, § 8, cl. 1; U.S. CONST. amend. XIV, § 5.

215. *Metro Broadcasting*, 110 S. Ct. at 3008 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 473-78 (1980) (Burger, C.J.)).

216. Alan Freeman, *Antidiscrimination Law: The View From 1989*, 64 TUL. L. REV. 1407, 1441 (1990).

217. 488 U.S. 469, 493-94 (1989) (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).

218. 110 S. Ct. at 3008-09.

219. *Croson*, 488 U.S. at 498-505 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia and Kennedy, JJ.).

220. Margaret E. Deane, Note, *City of Richmond v. J.A. Croson Co.: A Federal Legislative Answer*, 100 YALE L.J. 451, 455 (1990).

221. Note that Representative John Conyers, Jr., who is Chairman of the House Government Operations Committee, has held hearings on a bill to overturn the *Croson* decision by an act of Congress. Neil A. Lewis, *Court Ruling Encourages Affirmative Action*, N.Y. TIMES, July 4, 1990, § 1, at 12.

Supreme Court will continue to overturn state programs if they do not satisfy the strict evidentiary burden placed upon them.²²² In contrast, if Congress enacts an identical program, the affirmative action program will most likely be upheld under intermediate scrutiny. *Metro Broadcasting* has thus created an unstable constitutional regime, where programs will be found illegitimate if enacted by a state, but constitutionally permissible if legislated by Congress. This disparity is unjustified because federal and state affirmative action plans should be subjected to the same standard of constitutional review.

a. Programs Enacted by State Governments Should Be Subject to the Same Standard of Review as Federal Governments

Although the Equal Protection Clause by its terms applies only to states, it is well settled that equal protection analysis is the same under both the Fifth and Fourteenth Amendments.²²³ In *Bolling v. Sharpe*, the Court held that the equal protection component of the Fifth Amendment prohibited the federal government from maintaining racially segregated schools.²²⁴ The Court stated that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."²²⁵ The Supreme Court has consistently reaffirmed that "the reach of the equal protection guarantee of the fifth amendment is coextensive with that of the fourteenth [amendment]."²²⁶ Accordingly, state and federally imposed racial classifications should be subjected to the same level of scrutiny.

Congress has special power under section five of the Fourteenth Amendment, and thus, arguably, could be held to a lower standard of equal protection review.²²⁷ The Court in *Croson* distinguished *Fullilove*,

222. *Croson*, 488 U.S. at 498-505 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia and Kennedy, JJ.).

223. Brief for the United States as Amicus Curiae Supporting Petitioner at 12, *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990) (No. 89-453).

224. 347 U.S. 497 (1954).

225. *Id.* at 500.

226. *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (plurality opinion).

227. Section five of the Fourteenth Amendment grants Congress the power "to enforce, by appropriate legislation" the provisions of that amendment. U.S. CONST. amend. XIV, § 5. The Court in *Croson* held that Congress has "unique remedial powers . . . under Section 5 of the Fourteenth Amendment." 488 U.S. at 488 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia and Kennedy, JJ.).

Other reasons to give greater deference to Congress have been evinced. Congress represents the entire nation, while state and local legislatures draw their representatives from a small group. See 488 U.S. at 523 (Scalia, J., concurring in judgment) (quoting *THE FEDERALIST*, No. 10 (James Madison) (Clinton Rossiter ed. 1961)). Second, Congress has more resources than local governments to gain greater information regarding minority disparities.

which upheld a minority set-aside program, based on this special power of Congress.²²⁸ The *Croson* Court stated "that Congress may identify and redress the effects of society-wide discrimination [but this] does not mean that . . . States and their political subdivisions are free to decide that such remedies are appropriate."²²⁹

In effect, the *Croson* Court declared that states do not have the power to enforce the Fourteenth Amendment Equal Protection Clause.²³⁰ This reasoning appears invalid because "the Fourteenth Amendment was never intended to destroy the States' power to govern themselves."²³¹ Nothing in *Fullilove* implies that the equal protection guarantee can mean one thing for Congress and another for all other levels of government.²³² *Fullilove* alluded to section five only to validate Congress' findings regarding the record of past discrimination.²³³ The Fourteenth Amendment authorizes Congress to "enforce" the limited prohibitions of the Civil War Amendments,²³⁴ but Congress is still held to the limits of the Constitution.²³⁵

States have legislative power under the Equal Protection Clause, because the Constitution does not delegate exclusive authority to enforce the Fourteenth Amendment to Congress.²³⁶ The *Fullilove* Court relied

Nina Farber, Comment, *Justifying Affirmative Action After City of Richmond v. J.A. Croson: The Court Needs a Standard for Proving Past Discrimination*, 56 BROOK. L. REV. 975, 1000 (1990). A counterargument is that state and local governments are more closely involved with their respective communities and can better determine what policies should be implemented.

228. *Croson*, 488 U.S. at 504-05 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia and Kennedy, JJ.).

229. *Id.* at 490.

230. Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1657 (1990).

231. *Mitchell*, 400 U.S. at 126.

232. *Charles Fried, Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 117 (1990).

233. *Id.* at 115.

234. *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970). The Civil War Amendments comprise the Thirteenth, Fourteenth, and Fifteenth Amendments enacted by the Reconstruction Congress after the Civil War ended. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 445-47 (1986).

235. "Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

236. "[I]t cannot be successfully argued that the Fourteenth Amendment was intended to strip the states of their power . . . to govern themselves." *Id.* at 127.

The existence of a congressional power does not usually imply the nonexistence of a state power. An exception to this general rule is Congress' power under the Commerce Clause to "regulate Commerce with foreign Nations, and among the several states." U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause has been interpreted to be an implied limit on a state's power to regulate commerce. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (holding statute banning the use of certain large trucks was invalid because it unconsti-

on past precedent that stated "the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government into a central government of unrestrained authority."²³⁷ As the federal government is a government of enumerated powers, it cannot have more power than state governments, which are subject only to restrictions in the Constitution.²³⁸ If Congress alone held the power to enforce the Equal Protection Clause, it "would, under the guise of insuring equal protection, blot out all state power, leaving the 50 [fifty] states as little more than impotent figureheads."²³⁹ Thus, neither the structural guarantees of the Constitution nor section five of the Fourteenth Amendment can justify a different standard of review for Congress. Therefore, both the federal and state governments should be subject to the same standard of review.

b. States Should Have Full Power to Enact Programs Under the Fourteenth Amendment

Federalism distributes governmental authority between state and federal governments.²⁴⁰ In certain areas, states have full police power and the federal government has limited power to interfere.²⁴¹ Rationales

tionally burdened interstate commerce); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978) (invalidating Wisconsin regulations, which generally barred from its highways trucks longer than 55 feet); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (invalidating Illinois law requiring trucks to use curved mudflaps because statute unconstitutionally burdened interstate commerce); *Southern Pacific Co. v. Ariz.*, 325 U.S. 761 (1944) (striking down state statute that regulated train lengths, as it contravened the Commerce Clause). See also GERALD GUNTHER, *CONSTITUTIONAL LAW* 232 (11th ed. 1985); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-2, at 403 (2d ed. 1988).

Although this approach has never been used in the affirmative action area, if the Court limits state power under the Equal Protection Clause, it will be analogous to the Dormant Commerce Clause case law. If the Court denies states the right to enact their own affirmative action programs, it will in effect create a totally novel constitutional doctrine, which might be called the "Dormant Equal Protection Clause." Such a creation would have no roots in either precedent or constitutional theory. This analogy was introduced by Professor Lawrence B. Solum, Professor of Law at Loyola Law School, Los Angeles.

The rationale behind the Dormant Commerce Clause was to prohibit states from encroaching on other states' rights and to prevent states from impairing interstate commerce. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 249 (1986). This rationale is not present in the equal protection area because state affirmative action plans do not pose a threat to national unity.

237. *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966); *Fullilove*, 448 U.S. at 476-78 (discussing *Mitchell* and *Katzenbach*).

238. Mark Tushnet, *Justice Brennan, Equality, and Majority Rule*, 139 U. PA. L. REV. 1357, 1359 (1991).

239. *Mitchell*, 400 U.S. at 126.

240. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 122 (1986).

241. *Id.* at 125.

for federalism include efficiency, encouraging experimentation, promoting individual choice, and advancing democracy.²⁴² These theories support the idea that states should be given the same power to enforce the Equal Protection Clause as that given to the federal government.

Justices O'Connor and Scalia argued in *Croson* that Congress has special representation reinforcement powers.²⁴³ An argument can be made that Congress, unlike state and local governments, is a national representative body, and can best represent the interests of all the states.²⁴⁴ In contrast, however, state and local governments are more closely involved with their respective communities than is Congress, and therefore can better determine what policies should be implemented. Giving states the power to enforce the Fourteenth Amendment promotes efficiency because of the wide variance in circumstances across the country.²⁴⁵ State and local governments also provide an opportunity for people to participate directly in the activities of the government.²⁴⁶ Thus, state governments should have equal power to enact affirmative action programs.

2. The Distinction Between the Quota/Set-Aside and the Preference/Plus

The second distinguishing characteristic between the *Croson* and *Metro Broadcasting* affirmative action programs involves the difference between quotas and preferences. The program in *Croson* involved a set-aside quota,²⁴⁷ whereas the programs in *Metro Broadcasting* were considered preferences.²⁴⁸ This distinction appears to be an influential factor in determining the validity of race-conscious programs.²⁴⁹ In *Regents of the University of California v. Bakke* ("Bakke"),²⁵⁰ the Court distinguished the comparative preference used by Harvard University and the set-aside plan at issue used by the University of California at Davis ("U.C. Davis").²⁵¹ Justice Powell found the U.C. Davis plan, which set aside six-

242. *Id.* at 122-24.

243. *See Croson*, 488 U.S. at 486-93 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia, and Kennedy, JJ.), 526-28 (Scalia, J., concurring).

244. *See generally* THE FEDERALIST, No. 10, at 77 (James Madison) (Clinton Rossiter ed. 1961).

245. GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 123 (1986).

246. *Id.* at 124.

247. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477-78 (1989).

248. *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3009 (1990).

249. Jesse H. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 IOWA L. REV. 255, 255 (1987).

250. 438 U.S. 265 (1978).

251. *Id.* at 317 (Powell, J.). "[R]ace or ethnic background may be deemed a 'plus' in a

teen out of one hundred places for minority students,²⁵² too restrictive because it denied applicants the right to individual consideration without regard to race.²⁵³ Powell concluded that quotas were "facially invalid,"²⁵⁴ although he was the only Justice who held this, his influence appears in subsequent cases.²⁵⁵ The program invalidated in *Croson*²⁵⁶ involved a set-aside quota, like the program struck down in *Bakke*.²⁵⁷ The fact that the Supreme Court appears more willing to allow racial classifications, where the program does not involve a quota, illustrates that a distinction may exist between quotas and preferences in Supreme Court jurisprudence.

Actual differences exist between quota programs, which reserve places for minorities, and preference plans, which consider race as only one factor.²⁵⁸ These differences, however, are merely symbolic and administrative²⁵⁹ and do not mandate different standards of review. Symbolically, preferences are better because they judge the minority candidate on an overall basis, rather than solely on race.²⁶⁰ The flexible preference system is also more efficient administratively.²⁶¹ These differences, however, cannot justify a constitutional distinction between the two types of programs.²⁶² As one commentator has argued, "[t]here should be no constitutional distinction unless a quota program violates or threatens the constitutional rights of white applicants *as individuals* in some way that the more flexible programs do not."²⁶³

The FCC comparative preference policy upheld in *Metro Broadcasting* is similar to the Harvard scheme approved in *Bakke*, because in both instances, minority status was only one of several factors reviewed.²⁶⁴ It

particular applicant's file, yet it does not insulate the individual from comparison with all other candidates." *Id.*

252. *Id.* at 279.

253. *Id.* at 318 n.52.

254. *Id.* at 307.

255. Jennifer M. Bott, Note, *From Bakke to Croson: The Affirmative Action Quagmire and the D.C. Circuit's Approach to FCC Minority Preference Policies*, 58 GEO. WASH. L. REV. 845, 869 (1990).

256. *Croson*, 488 U.S. at 477-78.

257. *Bakke*, 438 U.S. at 408 (Stevens, J., joined by Burger, C.J., Stewart and Rehnquist, JJ.).

258. RONALD DWORKIN, A MATTER OF PRINCIPLE 309 (1985).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. RONALD DWORKIN, A MATTER OF PRINCIPLE 310 (1985) (emphasis in original).

264. Brief Amicus Curiae of The National Bar Association in Support of Respondent at 21-22, *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990) (No. 89-453).

can be argued, however, that the distress sale program is more similar to a quota program.²⁶⁵ In fact, the differences between the two minority preference policies at issue in *Metro Broadcasting* were dispositive in the lower court decisions.²⁶⁶ First, in the appellate decision of *Winter Park Communications v. F.C.C.*, the comparative preference policy was upheld because it did "not involve any quotas or fixed targets whatsoever, and minority ownership [was] simply one factor among several."²⁶⁷ The court relied on the opinion in *West Michigan Broadcasting Co. v. F.C.C.*, which also noted that the minority preference in comparative hearings is "but one factor in a competitive multi-factor selection system."²⁶⁸ Conversely, in the appellate decision of *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*, the court found the distress sale policy unconstitutional because "the policy singles out one aspect of diversity and elevates it to determinative status."²⁶⁹ At the lower court level, the flexibility of the comparative license procedure led to its affirmation; in contrast, the rigidity of the distress sale policy resulted in its reversal.²⁷⁰

The Supreme Court in *Metro Broadcasting* did not distinguish between the two policies, but treated them together as part of a combined effort to increase minority ownership.²⁷¹ The Court concluded the distress sale program was not a set-aside, because non-minorities could control whether a distress sale occurred and the policy applied "only with respect to a small fraction of broadcast licenses."²⁷² Whereas the *Croson* Court invalidated a quota program that set aside a certain number of places for minorities, the *Metro Broadcasting* Court upheld both of the minority preference programs.²⁷³ The differences between the two types of programs are insignificant and do not justify a different constitutional

265. "[T]he distress sale policy imposes a strict set-aside for the exclusive benefit of minority-owned broadcast stations." Michel Rosenfeld, *Metro Broadcasting, Inc. v. FCC: Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583, 594 (1991).

266. Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 131 (1990).

267. 873 F.2d 347, 354 (D.C. Cir. 1989), *aff'd sub nom.* *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990).

268. *West Michigan Broadcasting, Co. v. F.C.C.*, 735 F.2d 601, 613 (D.C. Cir. 1984) (emphasis in original).

269. *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*, 876 F.2d 902, 924 (D.C. Cir. 1989), *rev'd sub nom.* *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990).

270. Jennifer M. Bott, Note, *From Bakke to Croson: The Affirmative Action Quagmire and the D.C. Circuit's Approach to FCC Minority Preference Policies*, 58 GEO. WASH. L. REV. 845, 871 (1990).

271. Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 131 (1990).

272. *Metro Broadcasting*, 110 S. Ct. at 3026-27.

273. *Id.* at 3009.

standard.²⁷⁴

3. The Benign Classification

The Supreme Court failed not only to reconcile the disparate treatment between *Croson* and *Metro Broadcasting*, but also failed to articulate a standard for defining a benign affirmative action program. In order to protect the future of affirmative action programs, the Court in *Metro Broadcasting* should have developed a standard for ascertaining whether a race-based program is a benign classification. The Court's failure to delineate such a standard increases the confusion courts and governments face in reviewing and developing affirmative action programs. The case law appears to have developed another unintelligible standard, like the one so often quoted in the obscenity area—"I know it when I see it."²⁷⁵ If this is the test for determining whether a program is benign, it is likely the Supreme Court will rarely "see it," especially with Justices Brennan and Marshall retired from the Court.

For example, it is not clear from the Supreme Court's opinion why the *Metro Broadcasting* programs were considered benign, while the *Croson* plan was not. The *Croson* Court only stated that the mere assertion of benign purpose was entitled to no weight.²⁷⁶ Additionally, Justice O'Connor stated that there was no way to determine whether classifications were benign or motivated by "illegitimate notions of racial inferiority."²⁷⁷ In *Bakke*, however, Justices Brennan, Blackmun, Marshall, and White advocated a test for determining whether a program should be subject to intermediate or strict scrutiny.²⁷⁸ The *Metro Broadcasting* Court could have adopted the *Bakke* four-factor test to determine which standard of review would apply to a challenged program.

Intermediate scrutiny, rather than strict scrutiny, should be applied to a race-based classification if the following criteria are met. First, the governmental statute cannot restrict a fundamental right.²⁷⁹ Second, the disadvantaged class must not have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protec-

274. RONALD DWORKIN, A MATTER OF PRINCIPLE 309 (1985).

275. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

276. *Croson*, 488 U.S. at 500 (O'Connor, J., joined by Rehnquist, C.J., Stevens, White, Scalia and Kennedy, JJ.).

277. *Id.* at 493 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).

278. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357-76 (1978) (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part).

279. *Id.* at 357.

tion from the majoritarian political process."²⁸⁰ Next, the racial classification must be relevant to the goal sought.²⁸¹ Finally, the classification cannot be based on a presumption of racial inferiority, nor promote hatred.²⁸² If these four factors are met, the classification would be considered benign and therefore subject to only intermediate scrutiny. Although the above test leaves unanswered some questions of interpretation, it would certainly provide a clearer test than does the equivocal test currently used.

If the Court had applied the above test in *Metro Broadcasting*, it would have correctly applied intermediate scrutiny. The minority preference policies would have been subject to the lower standard because: (1) obtaining a broadcast license is not a fundamental right; (2) the program disadvantages white males, who do not have the traditional indicia of suspectness because they have not been subjected to a history of purposeful unequal treatment;²⁸³ (3) the racial classifications are relevant to obtaining program diversity;²⁸⁴ and (4) the classification is not based on a presumption of racial inferiority.²⁸⁵ If the Court had applied these four factors to the program at issue in *Croson*, it appears the program would also have been considered benign and the Court should have applied intermediate scrutiny, rather than strict scrutiny.

280. *Id.* (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

281. *Id.* at 357. See *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943), *reh'g granted*, 627 F. Supp. 1445 (Wash. 1986), *aff'd in part and rev'd in part*, 828 F.2d 591 (9th Cir. 1987).

282. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-22, at 1530-31 (2d ed. 1988).

283. A key aspect of the requirement of strict scrutiny under the *Carolene Products'* theory was the existence of a discrete insular minority unable to protect itself in the political process. Given its underpinning and values, *Carolene Products'* standards did not justify the imposition of strict scrutiny when whites claimed racial discrimination or equal protection violations.

Linda S. Greene, *Race in the 21st Century: Equality Through Law?*, 64 TUL. L. REV. 1515, 1532 (1990).

In *Bakke*, Justices Brennan, Blackmun, Marshall and White realized that such protection may be needed by white ethnic minorities; however, because the program did not on its face discriminate against any such group, they had no constitutional claim unless they could show discriminatory intent under *Washington v. Davis*, 426 U.S. 229 (1976). See *Bakke*, 438 U.S. at 358 n.35 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.).

"Because the Court in *Davis* [*Washington v. Davis*, 426 U.S. 229 (1976)] held that a policy did not trigger equal protection strict scrutiny even though it had a disproportionately adverse impact on blacks as a group, it would be ironic indeed if mere adverse impact on a white subgroup were enough to invalidate an affirmative action plan, or even to trigger strict scrutiny." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-22, at 1530 n.39 (2d ed. 1988) (emphasis in original).

284. *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3010 (1990).

285. "The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping." *Id.* at 3016.

In *Croson*, however, Justice O'Connor concluded that even if different levels of scrutiny applied to different groups, strict scrutiny would still apply to the program at issue²⁸⁶ because of the racial composition of Richmond's City Council.²⁸⁷ In noting that African-Americans comprised five of nine seats on the City Council,²⁸⁸ Justice O'Connor appeared to be inferring the existence of discrimination.²⁸⁹ She expressed a "concern that a political majority will more easily act to the disadvantage of a minority."²⁹⁰ Justice O'Connor stressed that unless the body enacting a racial preference has identified past discrimination, the measure may be a product of "unthinking stereotypes" or "racial politics."²⁹¹

The application of a higher standard of scrutiny when minorities have become majorities dooms affirmative action measures and puts cities with minority leaders at a disadvantage.²⁹² This approach ensures that almost all affirmative action programs enacted under minority leadership will be invalidated because they must withstand strict scrutiny, the most stringent judicial evaluation.²⁹³ If the Court is seriously concerned that minority leaders will enact affirmative action programs to purposely disadvantage the majority, this could be an additional factor considered in determining whether a program is benign. The additional criteria would still be better than no standard at all.

286. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).

287. David P. Stoelting, Note, *Minority Business Set-Asides Must Be Supported by Specific Evidence of Prior Discrimination: City of Richmond v. J.A. Croson Co.*, 58 U. CIN. L. REV. 1097, 1123 (1990).

288. *Croson*, 488 U.S. at 495 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).

289. Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1632 (1990).

290. *Croson*, 488 U.S. at 495-96 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).

While one could dismiss O'Connor's point as a facile legal argument, one may well take the statement as a warning to urban blacks who are gaining political power . . . that if they try to serve their own constituencies in the same way that white political majorities have always done in American cities, they will be hauled into court as racists.

Alan Freeman, *Antidiscrimination Law: The View From 1989*, 64 TUL. L. REV. 1407, 1432 (1990).

291. *Croson*, 488 U.S. at 510 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).

292. Cassandra D. Hart, *Unresolved Tensions: The Croson Decision*, 7 HARV. BLACK-LETTER J. 71, 72 (1990).

293. *Id.* at 84.

*C. Intermediate Scrutiny Should Apply to All Programs
That Benefit Minorities*

The Supreme Court correctly applied the intermediate scrutiny standard in *Metro Broadcasting*.²⁹⁴ Intermediate scrutiny requires the program at issue to be substantially related to an important governmental objective.²⁹⁵ In contrast, strict scrutiny requires a compelling interest to be necessary and narrowly tailored to the achievement of that interest.²⁹⁶ While the comparison of the two standards may seem like a quibble of words, in actuality it has far-reaching consequences. The test the Supreme Court decides to apply will almost always decide the outcome of the case.

All race-based classifications are subject to heightened scrutiny, either intermediate or strict scrutiny.²⁹⁷ Under strict scrutiny, all programs will assuredly be invalidated.²⁹⁸ In contrast, if the courts apply intermediate scrutiny to affirmative action programs, some plans may be upheld. Therefore, intermediate scrutiny should apply to all race-based classifications that benefit minorities, while strict scrutiny should still apply to those programs that hurt minorities. One commentator notes that "there does not appear to be any good reason for the adoption of the strict scrutiny standard for affirmative action programs."²⁹⁹ While affirmative action is in a sense reverse discrimination, the motivation behind the two forms is unmistakably different.³⁰⁰

The Equal Employment Opportunity Commission (EEOC) defines affirmative action as "actions appropriate to overcome the effects of past or present practices, policies or other barriers to equal employment opportunities."³⁰¹ Affirmative action is intuitively fair because it cancels out forms of discrimination, and increases the likelihood that women and minorities will be treated equally.³⁰² Therefore, these affirmative action programs should be upheld by the courts under intermediate scrutiny.

294. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., joined by White, Marshall, and Blackmun, JJ.).

295. *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3009 (1990).

296. JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 591-92 (2d ed. 1983).

297. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 496 (1986).

298. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6, at 1451-52 (2d ed. 1988).

299. Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 350 (1990).

300. *Id.* at 353.

301. 29 C.F.R. § 1608.1(c) (1985).

302. Joel J. Kupperman, *Relations Between the Sexes: Timely vs. Timeless Principles*, 25 SAN DIEGO L. REV. 1027, 1038 (1988).

1. Strict in Scrutiny Means Fatal in Fact

One scholar has commented that "strict in scrutiny" means "fatal in fact."³⁰³ If strict scrutiny is applied to benign programs, then most, if not all, programs will fail. The program must overcome an almost conclusive presumption of unconstitutionality.³⁰⁴ In the Supreme Court's history, only one racially based program has withstood strict scrutiny.³⁰⁵ The Fourteenth Amendment's original purpose was to address hostile legislation that imposed a stigma on the disadvantaged minority.³⁰⁶ Those who drafted the Equal Protection Clause intended to attack slavery, but it is unlikely they intended to outlaw all racial classifications or expected that such a prohibition would result.³⁰⁷ If strict scrutiny is applied to all race-based programs, even those that benefit minorities, the courts will most assuredly invalidate all affirmative action programs. It is "ironic that a measure [the Equal Protection Clause] enacted to protect a minority from adverse treatment could be used to bar programs designed to remedy past discrimination."³⁰⁸

Under the first prong of strict scrutiny, the only interest that Supreme Court decisions to date have found compelling is remedying past discrimination.³⁰⁹ Under *Croson*, this finding must be explicit.³¹⁰ The *Croson* Court found that the governmental interest of remedying past discrimination was insufficient due to a lack of factual predicate.³¹¹ The Court held that strict scrutiny requires the government to prove they engaged in past, intentional discrimination.³¹²

In *Croson*, the City of Richmond claimed that past discrimination

303. Gerald Gunther, *The Supreme Court, 1971 Term - Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

304. Judith C. Areen et al., *Scholars Reply to Professor Fried*, 99 YALE L.J. 163, 166 (1989).

305. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1451-52 (2d ed. 1988). In *Korematsu v. United States*, 323 U.S. 214 (1944), the Supreme Court deferred to military judgment and upheld a statute requiring internment of Japanese-Americans during World War II. The case has since been severely criticized and would almost surely be held unconstitutional today. Mary C. Daly, *Affirmative Action, Equal Access and the Supreme Court's 1988 Term: The Rehnquist Court Takes a Sharp Turn to the Right*, 18 HOFSTRA L. REV. 1057, 1103-04 (1990).

306. GERALD GUNTHER, CONSTITUTIONAL LAW 743 (11th ed. 1985).

307. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 226 (1978).

308. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 664 (2d ed. 1983).

309. *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3033-34 (1990) (O'Connor, J., dissenting).

310. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-99 (1990) (O'Connor, J., joined by Rehnquist, C.J., Stevens, White and Kennedy, JJ.).

311. *Croson*, 488 U.S. at 505 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia, and Kennedy, JJ.).

312. *Id.*

existed and proved it with the following: (1) a statistical study showing that although Richmond's population was fifty percent African-American, less than one percent of its prime construction contracts had been allotted to minority businesses;³¹³ (2) figures establishing that virtually no minorities were members of local contractor associations; (3) a similar plan had been upheld in *Fullilove v. Klutznick*;³¹⁴ and (4) the statements of members of Richmond's City Council indicating widespread racial discrimination in the construction industry.³¹⁵ The Court, however, addressed each of the findings that had formed the basis of the plan, and declared them to be individually and collectively insufficient.³¹⁶

Most programs will fail this standard if it is applied. Additionally, governments will be deterred from enacting affirmative action programs because they will not want to admit to intentional, past discrimination. Thus, if strict scrutiny is applied to all race-based classifications, it is likely no affirmative action programs will be upheld. In contrast, under intermediate scrutiny the *Metro Broadcasting* Court did not require specific evidence of past discrimination and upheld the affirmative action programs.³¹⁷

2. Strict Scrutiny Should Not Be Applied to Benign Programs

Justice Marshall, in his dissent in *Croson*, disagreed vehemently with the application of strict scrutiny to benign affirmative action programs:

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal

313. The study showed that "while the general population of Richmond was 50% black, only 0.67% [less than one percent] of the city's prime construction contracts had been awarded to minority businesses." *Id.* at 479-80.

314. 448 U.S. 448 (1980).

315. *Croson*, 488 U.S. at 498-506 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia and Kennedy, JJ.); Margaret E. Deane, Note, *City of Richmond v. J.A. Croson Co.: A Federal Legislative Answer*, 100 YALE L.J. 451, 453 (1990).

The *Croson* majority dismissed these gross underrepresentations of people of color, of blacks in particular, as potentially attributable to their lack of "desire" to be contractors. In other words, the nearly one hundred percent absence of a given population from an extremely lucrative profession was explained away as mere lack of initiative. Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 532-33 (1990).

"One need have only the dimmest idea of American history to have a sense of why African-Americans were underrepresented in the construction industry in Richmond, Virginia. Two hundred and fifty years of slavery were followed by four score years of legally enforced subordination of blacks." T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1073 (1991).

316. *Croson*, 488 U.S. at 498-506 (O'Connor, J., joined by Rehnquist, C.J., Stevens, White, Scalia and Kennedy, JJ.).

317. 110 S. Ct. at 3008-09.

and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice.³¹⁸

The purpose of strict scrutiny is to "smoke out" illegitimate uses of discrimination by assuring that the goal of the legislative body is important enough to warrant using a highly suspect tool.³¹⁹ Strict scrutiny also ensures that the means are narrowly tailored, so that there is no possibility of illegitimate racially prejudicial motives.³²⁰ If courts subject all race-based programs to strict scrutiny, then even benign programs must pass the test applied in *Croson*. A benign program, however, usually comes into existence when a majority voluntarily decides to disadvantage themselves. Thus, an improper motive is impossible, and strict scrutiny is unnecessary.

The two types of programs should not be treated the same, because a significant difference exists between a classification framed to help those who have suffered past discrimination and a racial classification that causes further disadvantage.³²¹ Additionally, requiring strict scrutiny for affirmative action programs is entirely unnecessary to safeguard interests of non-minorities, who have enjoyed the benefits from centuries of legal superiority.³²² In sum, the intermediate scrutiny standard of re-

318. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552 (1989) (Marshall, J., dissenting). In response to Justice Marshall, Justice O'Connor replied that "[t]he dissent's watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." *Id.* at 495 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.) (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting)).

319. *Croson*, 488 U.S. at 493 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).

320. *Id.*

321. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 309 (1985). "A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism" *Croson*, 488 U.S. at 551-52 (Marshall, J., dissenting).

322. Dianne E. Dixon, *The Dismantling of Affirmative Action Programs: Evaluating City of Richmond v. J.A. Croson Co.*, 7 JOURNAL OF HUMAN RTS. 35, 52 (1990). In *Croson*, Justice Marshall noted:

It cannot seriously be suggested that nonminorities in Richmond have any "history of purposeful unequal treatment." Nor is there any indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect. Indeed, the numerical and political dominance of nonminorities within the State of Virginia and the Nation as a whole provides an enormous political check against the "simple racial politics" at the municipal level which the majority fears.

488 U.S. at 553-54.

view is sufficient when a benign affirmative action program is at issue.

V. EFFECTS AND IMPLICATIONS OF *METRO BROADCASTING*

A. *Classifications Based on Gender Can Pass Constitutional Scrutiny More Easily Than Benign Racial Classifications*

If strict scrutiny is imposed on benign affirmative action programs, then the Equal Protection Clause becomes more generous toward affirmative action programs for females than it is for those programs that benefit minorities.³²³ This is ironic because the primary purpose of the Equal Protection Clause was to benefit minorities. The "one prevailing purpose" of the Fourteenth Amendment was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."³²⁴ Since its enactment, however, the Fourteenth Amendment has benefited other interests unrelated to providing racial equality.³²⁵

Gender-based classifications are subject to heightened scrutiny under the Equal Protection Clause.³²⁶ Women, however, are not considered a suspect class and therefore are not subject to strict scrutiny.³²⁷ The Court instead applies intermediate scrutiny to all gender-related classifications. A gender-based plan must serve "important governmental objectives" and be "substantially related to the achievement of those objectives."³²⁸ The intermediate scrutiny test applies regardless of whether the affirmative action program was enacted by a federal or state government and whether the policy is a quota or preference.³²⁹

323. Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 339 (1990).

324. *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1872).

325. Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U.L. REV. 1307, 1310 (1991).

326. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982); *Reed v. Reed*, 404 U.S. 71, 75 (1971).

327. Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 347 (1990).

328. *Mississippi Univ. for Women*, 458 U.S. at 724 (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

329. See, e.g., *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980) (employing intermediate scrutiny, the Court struck down a Missouri workers' compensation law that required a widower, but not a widow, to prove dependence on the spouse in order to qualify for benefits); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (excluding students from women's school of nursing based solely on gender violated Equal Protection Clause); *Orr v. Orr*, 440 U.S. 268 (1979) (striking down law allowing courts to order alimony payments only to women); *Califano v. Westcott*, 443 U.S. 76 (1979) (holding that a provision of the federally enacted Social Security Act violated the equal protection component of the Fifth Amendment,

As the law currently stands, courts apply intermediate scrutiny even to those statutes challenged as a burden on males.³³⁰ It is interesting to note that Chief Justice Rehnquist has dissented in many of these cases because of the standard applied by the Court. Ironically, in contrast to his opinions regarding minorities, the Chief Justice has consistently advocated a lower standard of scrutiny for males in gender discrimination cases.³³¹ He argues that a lower standard of review is applicable because men have suffered no history of discrimination or disadvantage, and are therefore not "in need of the special solicitude of the courts."³³² Advocating a lower standard for benign gender discrimination is analogous to applying intermediate scrutiny to benign affirmative action; however, Chief Justice Rehnquist has failed to draw this distinction and has advocated strict scrutiny for all race-based classifications, including benign affirmative action programs.³³³ Thus, more gender-based programs will withstand the Court's constitutional analysis under a lower standard than that used to judge benign race classifications.³³⁴

Under current Supreme Court doctrine, affirmative action programs that benefit females will be upheld more often than those benefiting African-Americans, the intended beneficiaries of the Equal Protection Clause. If courts implement an intermediate standard for all benign programs, then at least minorities and females will receive equal treatment. It could be argued, however, that the adoption of intermediate scrutiny for all benign race and gender classifications does not go far enough, because it only places females and minorities on equal grounds.³³⁵ Minorities, especially African-Americans, deserve favored treatment because of their past suffering and may be entitled to an even lower standard of

by providing benefits to the dependent children of unemployed fathers, but not those of unemployed mothers); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (invalidating a Social Security provision that paid survivor benefits to widowers only if they could show substantial reliance on deceased's income); *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating state statute prohibiting the sale of beer to certain males under intermediate scrutiny); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (invalidating Social Security benefits confined to widows because purpose was not remedial).

330. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-27, at 1569 (2d ed. 1988).

331. *Michael M. v. Superior Court*, 450 U.S. 464 (1981); *Craig v. Boren*, 429 U.S. 190, 218-19 (1976) (Rehnquist, J., dissenting).

332. *Michael M.*, 450 U.S. at 476.

333. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).

334. Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 350 (1990).

335. *Id.* at 351.

review.³³⁶

B. *The Supreme Court Is Eroding State Power*

After *Metro Broadcasting*, the only affirmative action programs that are likely to be upheld are those enacted by Congress. By ruling that Congress has broader power than state legislatures to mandate affirmative action, the Court has reinforced the complaint of state and local officials that their constitutional authority is being eroded.³³⁷ By overturning laws enacted by state governments, the Court wrongly interferes with the everyday management of local government affairs. The negative, practical consequences for state governments should not be understated.³³⁸

The strict scrutiny test is very stringent and requires state governments to admit they engaged in past discrimination.³³⁹ As a practical matter, it subjects state-enacted affirmative action programs to protracted litigation so that state and local governments may prove they were guilty of racist behavior.³⁴⁰ Requiring governments to admit guilt for past discrimination significantly deters the implementation of voluntary affirmative action programs.³⁴¹

Additionally, remedying past discrimination is the only compelling interest to date that has withstood strict scrutiny.³⁴² Aside from remedying past discrimination, governments or employers may have many other reasons for enacting affirmative action programs. In *Wygant*, the school board adopted an affirmative action plan to improve the quality of education and provide role models for its students.³⁴³ In *Bakke*, it was to pro-

336. Roy L. Brooks, *Affirmative Action in Law Teaching*, 14 COLUM. HUM. RTS. L. REV. 15, 42-45 (1982).

337. Linda P. Campbell, *States Fear More Issues Becoming a Federal Case*, CHI. TRIB., July 15, 1990, at C5.

338. Many state and local government plans that followed Congress' lead in expanding minority access to government were subject to protracted litigation by the *Croson* decision. Kathleen M. Sullivan, *City of Richmond v. J.A. Croson Co.: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609, 1615 (1990).

339. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (O'Connor, J., joined by Rehnquist, C.J., White, Stevens, Scalia, and Kennedy, JJ.) (1989).

340. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 278 n.5 (1986) (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ.).

341. Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 92 (1986).

342. *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997, 3033-34 (1990) (O'Connor, J., dissenting).

343. *Wygant*, 476 U.S. at 272 (Powell, J., joined by Burger, C.J., Rehnquist and O'Connor, JJ.).

mote diversity in education.³⁴⁴ Employers may also have forward-looking reasons for affirmative action: to improve their services to minorities, avert racial tension, or increase the diversity of a work force.³⁴⁵ Voluntary affirmative action programs should be implemented in order to attain a more racially-balanced and brighter future for minorities.³⁴⁶ The Court should allow these forward-looking justifications so that some day racial classifications will no longer be needed.

VI. CONCLUSION

The distribution of wealth and power has been skewed by massive and, until fairly recently, governmentally sanctioned racial discrimination targeted at minorities.³⁴⁷ This discrimination has severely limited the opportunities of minorities to compete in society.³⁴⁸ Discrimination has been prevalent in this country, and has denied many people basic privileges, including an equal opportunity to live where they choose, to attend schools, to obtain jobs, and to attain government benefits such as construction contracts or broadcast licenses.³⁴⁹ Preferential treatment is necessary to remedy the lingering effects and continued discriminatory impact of racism.³⁵⁰ As Justice Blackmun stated, "In order to get be-

344. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-14 (1978) (Powell, J.).

345. See Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329 (1986).

346. Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 97 (1986).

347. Brief Amicus Curiae of the American Civil Liberties Union, The New York City Commission on Human Rights, and The NOW Legal Defense and Education Fund in Support of Petitioner in No. 89-700 and in Support of Respondents in No. 89-453 at 7, *Astroline Communications Company v. Shurberg Broadcasting of Hartford, Inc.*, 110 S. Ct. 2997 (1990) (No. 89-700); *Metro Broadcasting, Inc. v. F.C.C.*, 110 S. Ct. 2997 (1990) (No. 89-453).

348. *Id.*

349. Cassandra D. Hart, *Unresolved Tensions: The Croson Decision*, 7 HARV. BLACK-LETTER J. 71, 95 (1990).

Justice Brennan points out in his plurality opinion in *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC* that because of a long history of discrimination, affirmative race-conscious relief may be the only means available "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." Affirmative action "promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices."

478 U.S. 421, 450 (1986) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973), and *NAACP v. Allen*, 493 F.2d 614, 621 (5th Cir. 1974)) (citations omitted).

350. Margaret E. Deane, Note, *City of Richmond v. J.A. Croson Co.: A Federal Legislative Answer*, 100 YALE L.J. 451, 451 (1990). See also Judith C. Areen et al., *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711 (1989).

yond racism, we must first take account of race."³⁵¹ Affirmative action programs, however, should not be seen as a reinstatement of the ugly exclusionary practices of the past;³⁵² rather, they are a means of achieving equality for all.³⁵³

We cannot promote the ideals of equality, fairness, and equal opportunity without implementing affirmative action plans.³⁵⁴ Unless *Metro Broadcasting* is expanded, however, it is destined to have only a limited effect on affirmative action jurisprudence.³⁵⁵ Because the Supreme Court has failed to provide specific guidelines for assessing the constitutionality of minority preference programs, a substantial likelihood exists that the new Supreme Court will find many ways to limit this opinion.³⁵⁶ While *Metro Broadcasting* provided a good result, its reasoning is likely to be

351. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (separate opinion of Blackmun, J.). See also *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 239 (5th Cir. 1977) (dissenting opinion), *rev'd*, *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (writing that as long as "the pervasive effects of centuries of societal discrimination still haunt us," reasonable efforts to undo them should be sustained).

352. Some Justices argue that benign programs are ineffective because prejudice is fostered whenever racial distinctions exist, and preferential treatment reinforces the sense of inferiority among minorities. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 224 (1978). For example, Justice O'Connor stated in *Metro Broadcasting*:

The dangers of such classifications are clear. They endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict. Such policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts — their very worth as citizens — according to a criterion barred to the Government by history and the Constitution. Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit.

Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997, 3029 (1990) (O'Connor, J., dissenting) (citations omitted). However, Justices should not be allowed to overrule decisions of other officials because they disagree with the efficiency of social politics. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 224 (1978).

353. Cassandra D. Hart, *Unresolved Tensions: The Croson Decision*, 7 HARV. BLACK-LETTER J. 71, 95 (1990).

For additional commentaries favoring affirmative action, see Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986); Myrl L. Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503 (1982); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

354. Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1659 (1990).

355. "Justice Brennan's departure from the Court adds further uncertainty about doctrinal developments in this area, including the longevity of *Metro Broadcasting*." T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062 (1991).

356. The Court will continue to ignore precedent, find a narrow interpretation, or place a greater procedural burden on plaintiffs, rather than overrule precedent. Mary C. Daly, *Affirmative Action, Equal Access and the Supreme Court's 1988 Term: The Rehnquist Court Takes a Sharp Turn to the Right*, 18 HOFSTRA L. REV. 1057, 1069 (1990).

problematic in the future, especially without Justices Brennan and Marshall on the Supreme Court. In addition to failing to distinguish *Croson*, the opinion lacks a test for determining whether a program is "benign." Thus, the new Court may easily construct a narrow definition of benign affirmative action programs. Additionally, any program enacted by a state or local government will be required to withstand strict scrutiny under *Croson*, and *Metro Broadcasting* will never come into play.

As the law stands now, any race-based program that is enacted by a state or local government will be subject to strict scrutiny under *Croson*³⁵⁷ and will certainly fail constitutionally.³⁵⁸ The same is true for all quota or set-aside programs under *Croson* and *Bakke*. *Metro Broadcasting* allows only "benign congressionally mandated" minority preferences to be reviewed by intermediate scrutiny.³⁵⁹ If any of these factors are missing, or if a question exists regarding whether the program is actually benign, the "strict in scrutiny . . . fatal in fact"³⁶⁰ test will apply, and the program will be found unconstitutional.

Unfortunately, the *Metro Broadcasting* decision does little to resolve the conflicting mandates of the Equal Protection Clause. Affirmative action is now in the hands of Congress. Before the new Supreme Court can limit the effect of *Metro Broadcasting*, Congress should either pass legislation authorizing states and local governments to implement affirmative action programs or it should itself mandate new programs to protect against the Supreme Court's continued erosion.³⁶¹

Rebecca Jean Smith*

357. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.).

358. "Strict in scrutiny" means "fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term - Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). See *supra* notes 304-15 and accompanying text.

359. *Metro Broadcasting*, 110 S. Ct. at 3008-09.

360. Gerald Gunther, *The Supreme Court, 1971 Term - Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

361. "Such legislation would facilitate more rapid integration of minorities and women into the economic mainstream of the nation and foster racial and gender harmony in the workplace." Mary C. Daly, *Affirmative Action, Equal Access and the Supreme Court's 1988 Term: The Rehnquist Court Takes a Sharp Turn to the Right*, 18 HOFSTRA L. REV. 1057, 1061 (1990).

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